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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1600

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLARD WIRTZ, Trustees of the Property of the PENN CENTRAL TRANSPORTATION COMPANY,

Petitioners,

v.

FIDEL GÖTZ, VOLKER GÖTZ, FINANZ AKTIENGESELLSCHAFT, VILEDA ANSTALT, GÖTZ AKTIENGESELLSCHAFT OF ST. GALLEN (Also Known as GÖTZ AG OF ST. GALLEN, or GÖTZ ANSTALT OF ST. GALLEN, or GÖTZ ETABLISSEMENT OF ST. GALLEN, or GÖTZ ESTABLISHMENT OF ST. GALLEN), INTER-INDUSTRY AKTIENGESELLSCHAFT OF ST. GALLEN (Also Known as INTER-INDUSTRY AG OF ST. GALLEN, or INTER-INDUSTRY ANSTALT OF ST. GALLEN, or INTER-INDUSTRY ETABLISSEMENT OF ST. GALLEN, or INTER-INDUSTRY ESTABLISHMENT OF ST. GALLEN), INTER-MARKETING CORP. ANSTALT (Also Known as INTER-MARKETING CORP. ETABLISSEMENT, or INTER-MARKETING CORP. ESTABLISHMENT), MINOLTA ANSTALT, and FINANZ AG ST. GALLEN.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS AND PROCEDURAL RULES INVOLVED	4
STATEMENT OF THE CASE	9
1. In the District Court	9
2. In the Court of Appeals	12
REASONS FOR GRANTING THE WRIT	15
I. The Court of Appeals In Banc Was Equally Divided on the Important Federal Constitutional Questions Involved	15
II. This Court Should Finally Settle the Issue Whether the Delaware Sequestration Procedure Violates the Due Process Provisions of the Fifth and Fourteenth Amendments Because It Authorizes the Seizure of Property Without Notice or Opportunity for Hearing	17
III. This Court Should Finally Settle the Issue Whether the Delaware Sequestration Procedure Violates the Due Process Provisions of the Fifth and Fourteenth Amendments When the State Lacks Minimum Contacts With Either the Subject Matter or the Parties	21
IV. This Court Should Settle the Question Whether the Sequestrations Constituted an Unconstitutional Search and Seizure	24
CONCLUSION	27

TABLE OF CASES CITED.

Page

Boyd v. United States, 116 U. S. 616 (1886) 13, 25, 26
Camara v. Municipal Court, 387 U. S. 523 (1967) 25
Chicago R. I. & P. R. Co. v. Sturm, 174 U. S. 710 (1899) ... 22
English v. Cunningham, 80 S. Ct. 18 (1959) 16
Forsyth v. Hammond, 166 U. S. 506 (1896) 2
Fuentes v. Shevin, 407 U. S. 67 (1972) 12, 17, 18, 19, 20, 21, 23
Hanson v. Denckla, 357 U. S. 235 (1958) 23
Harris v. Balk, 198 U. S. 215 (1905) 22
International Shoe v. Washington, 326 U. S. 310 (1945) ..22, 23, 24
Landau v. Best, 187 A. 2d 75, 41 Del. Ch. 1 (Del. Supr. 1962) 24
Lebowitz v. Forbes Leasing and Finance Corp., 456 F. 2d 979 (3d Cir. 1972) 19, 21
Magnum Import Co. v. De Spoturno Coty, 262 U. S. 159 (1922) 16
McDonald v. Mabee, 243 U. S. 90 (1917) 23
Meredith v. Fair, 306 F. 2d 374 (5th Cir. 1962) 16
Ownbey v. Morgan, 256 U. S. 94 (1920) 12, 19, 20, 23, 24
Pennoyer v. Neff, 95 U. S. 714 (1877) 22
Sniadach v. Family Finance Corp., 395 U. S. 337 (1969) 19
Weinress v. Bland, 71 A. 2d 59, 31 Del. Ch. 269 (Del. Ch. 1950) 24
Wyman v. James, 400 U. S. 309 (1971) 13, 25, 26

MISCELLANEOUS.

Page

Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L. J. 663 (1974) 17

Delaware Court of Chancery, Rules, Rule 4(db) 2, 5, 10, 11, 13

5A Del. C., Section 8-317(1) 24

8 Del. C. § 169 23

10 Del. C. § 366 .....2, 4, 8, 10

Federal Rules of Civil Procedure, Rule 4(e) 2, 3, 4, 8, 10

Federal Rules of Appellate Procedure, Rule 35(a) 15

Staff Report of the Committee on Banking and Currency of the House of Representatives "The Penn Central Failure and the Role of Financial Institutions" (1971), Part IV ... 9

UCC, Section 8-317(1) 24

United States Constitution:

Fourth Amendment 25

Fifth Amendment 13, 21

Fourteenth Amendment 13, 21

28 U. S. C. § 1254(1) 2

28 U. S. C. § 1332(a)(2) 10

28 U. S. C. § 1391(d) 10

Wright & Miller, Federal Practice and Procedure: Civil (1969) § 1075, p. 316 3

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners (Trustees) are the Trustees of the Property of Penn Central Transportation Company (Penn Central), Debtor in proceedings for the reorganization of a railroad pursuant to Section 77 of the Bankruptcy Act, No. 70-347 pending in the United States District Court for the Eastern District of Pennsylvania. The Trustees pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on February 21, 1974.

OPINIONS BELOW.

The *per curiam* opinion of the Court of Appeals in banc dated February 21, 1974 is not reported, and is printed in the Appendix (6a-7a).[1] The majority and dissenting opinions of the panel of the Court of Appeals dated August 31, 1973 are not reported, and are printed in the Appendix (12a-66a). The opinion of the District Court dated December 20, 1971 is reported at 336 F. Supp. 197 (D. Del. 1971), and is printed in the Appendix (73a-85a).

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1. References are to the pages of the Appendix to this petition, separately presented. Rule 23(i) of the Rules of this Court.

JURISDICTION.

The Court of Appeals in banc entered judgment (4a-5a) on February 21, 1974. A timely petition for rehearing containing a suggestion for rehearing in banc was filed by the Trustees on March 6, 1974, and was denied by order (2a-3a) of the Court of Appeals in banc dated March 15, 1974. The Trustees filed a motion for stay pending application to this Court for a writ of certiorari, which the Court of Appeals granted by order (1a) dated April 1, 1974, thereby staying its mandate until April 25, 1974.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). This Court's power to issue a writ of certiorari is in no way affected by the fact that the Court of Appeals in banc was equally divided. *Forsyth v. Hammond,* 166 U. S. 506, 513 (1896).

QUESTIONS PRESENTED.

Under Rule 4(e) of the Federal Rules of Civil Procedure, whenever a statute or rule of court of the state in which a district court is held provides for notice to a party not an inhabitant of or found within the state to appear and respond or defend in an action by reason of the seizure of his property located within the state, service of the summons may be made under the circumstances and in the manner prescribed in the statute or rule. Delaware's sequestration procedure—embodied in 10 Del. C. § 366 and in Delaware Court of Chancery Rule 4(db)—provides for such notice to a party not an

inhabitant of or found within the state to appear by reason of the sequestration of his property located within the state. The Delaware District Court issued an order pursuant to Rule 4(e) providing for service of the summons, in accordance with the Delaware sequestration procedure, upon defendants, all aliens located in Europe.

The questions presented are:

1. Does such sequestration violate the due process provisions of the Fifth and Fourteenth Amendments [2] because it provides for the seizure of a non-resident's property located within the state without prior notice and an opportunity to be heard?

2. Does such sequestration violate the due process provision of the Fifth and Fourteenth Amendments when there are no minimum contacts between the state and either the subject matter or the defendants, but the defendants are all aliens not otherwise suable in the United States?

3. Did the sequestrations herein constitute unreasonable searches and seizures in violation of the Fourth Amendment?

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2. When service of process is made pursuant to state law, the federal court applies both federal and state law—federal law to determine the constitutional validity of the service and state law to see if the procedures set out in the applicable state statute or rule have been followed. Wright & Miller, Federal Practice and Procedure: Civil (1969) § 1075, p. 316.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND PROCEDURAL RULES INVOLVED.

Rule 4(e) of the Federal Rules of Civil Procedure provides in part:

> Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment of similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

10 Del. C. § 366 provides in part:

> § *366. Compelling appearance of non-resident defendant*
>
> (a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a non-resident of the State of Delaware, the Court may make an order directing such non-resident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such non-resident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for three consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the

demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

Rule 4(db) of the Delaware Court of Chancery Rules provides:

> (db) Service by Publication and Seizure. (1) no order shall be entered under 10 Del. C. § 366 unless it appears in the complaint that the defendant or any one or more of the defendants is a non-resident of the State of Delaware and the application therefor is accompanied by the affidavit of a plaintiff or other credible person stating:
>
> > (a) As to each non-resident defendant whose appearance is sought to be compelled, his last known address or a statement that such address is unknown and cannot with due diligence be ascertained.

(b) The following information as to the property of each such defendant sought to be seized:

(1) A reasonable description thereof.

(2) The estimated amount and value thereof.

(3) The nature of the defendant's title or interest therein; and if such title or interest be equitable in nature, the name of the holder of the legal title.

(4) The source of affiant's information as to any of the items as to which the affidavit is made on information and belief.

(5) The reason for the omission of any of the required statements.

(2) Within three business days after the filing of such bond or bonds as may be required or within such other times as the court may fix, the Register shall, in addition to making the required publication, send by registered or certified mail to each defendant whose appearance is sought to be compelled a certified copy of the order and a copy of the pleading asserting the claim.

(3) After the filing of such bond or bonds as may be required by the order, but not later than 10 days after the date of the order of seizure, the sequestrator shall serve a certified copy of the order upon the person, persons or corporation having possession or custody of the property or control of its transfer, and shall seize the property. The sequestrator shall seize property which is, or ap-

pears, not to be susceptible of physical seizure within the state by serving a direction in writing that the person, persons or corporation having possession or custody of the property or control of its transfer, shall:

(a) retain the property and recognize no transfer thereof until further notice from the sequestrator or order of the Court;

(b) forthwith make a notation upon any records pertaining to the property that such property is held pursuant to the order of the Court; and

(c) within ten days after the date of such service, deliver a certificate under oath to the sequestrator, specifying (i) such defendant's property, if any, of which it has possession, custody or control or control of its transfer; (ii) whether the title or interest of each such defendant is legal or beneficial; and (iii) if legal, the name and address of the holder of any equitable title or interest therein, if known, and, if beneficial, the name and address of the holder of the legal title thereto, if known.

(4) Within twenty days after seizure, unless otherwise specially ordered, the sequestrator shall make his return to the court, therein setting out all proceedings hereunder to the date of said return, including the date and hour of service and seizure pursuant to subdivision (3) hereof.

(5) The court may in its discretion and subject to statutory requirements dispense with or

modify compliance with the requirements of any part of this rule in any cause upon application to it stating the reasons therefor.

The full texts of Rule 4(e) of the Federal Rules of Civil Procedure and of 10 Del. C. § 366 are set out in the Appendix, as well as other applicable statutory and constitutional provisions involved.

STATEMENT OF THE CASE.

1. In the District Court.

This case, which squarely presents the opportunity for this Court to answer a challenge to the continuing validity of established precedents, has its roots in a bizarre factual setting.

In 1969, prior to its reorganization, Penn Central obtained a $10 million loan from a syndicate of German banks, $6 million of which was soon used in connection with a railroad equipment program. The remaining $4 million was placed in a trust account in Liechtenstein.

After Penn Central instituted reorganization proceedings in 1970 and the appointment of the Trustees, it was discovered that the $4 million [3] of the loan proceeds was no longer held in the trust and was in the possession of defendant Vileda Anstalt, a Liechtenstein entity owned and controlled by Fidel Götz (Gotz) a German citizen.[4]

On March 10, 1971, the Trustees instituted suit to recover the misappropriated funds belonging to the Debtor. This suit was brought against Gotz, his son

3. Specifically, the sum of DM 16,800,000 which in 1969 had a value of in excess of $4.6 million, and which now has a value in excess of $6 million.

4. Gotz has been described in a Congressional Staff Report on the subject as "a German national operating his far-flung business ventures out of the tiny European state of Liechtenstein" (103a). The conversion of the $4 million by Gotz through entities controlled by him, has been described in the same Report "as a tale of financial chicanery rarely matched in the annals of the business world" (102a), and as having "all the elements of a film script of international financial intrigue" (109a). See Staff Report of the Committee on Banking and Currency of the House of Representatives entitled "The Penn Central Failure and the Role of Financial Institutions" (1971). Part IV of that study is entitled "Penn Central Loses Four Million Dollars: A Story of International Intrigue," and is set out in the Appendix (100a-134a).

and seven [5] entities, alleged to be controlled by Gotz, all aliens located in Europe, and was filed in the United States District Court for the District of Delaware,[6] basing the jurisdiction of the District Court upon 28 U. S. C. § 1332(a)(2) pertaining to aliens and diversity of citizenship. Among other things, the complaint alleged that Gotz, acting through—and in conspiracy with—the other alien defendants, fraudulently converted and embezzled $4 million of Penn Central's moneys from the trust located in Liechtenstein.

Utilizing the provisions of Rule 4(e) of the Federal Rules of Civil Procedure, the Trustees applied to the District Court for a sequestration order under 10 Del. C. § 366 (87a) and under Delaware Court of Chancery Rule 4(db) (89a). The Trustees' complaint alleged that the defendants were all aliens located in Europe. The Trustees filed the affidavit prescribed by Delaware Court of Chancery Rule 4(db), containing certain information concerning the property of the non-resident defendants to be seized. The District Court's sequestration order directed the service of copies of the summons, complaint and order by certified mail upon defendants in Europe, and also directed publication of the order in a local newspaper. The clerk of the District Court sent such copies to the defendants at their European addresses, which copies were received. The District Court's sequestration order also provided for the appointment of a seques-

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5. Four corporations and three *Anstalt* defendants. An *Anstalt* (translated as Establishment or Foundation) is an entity peculiar to Liechtenstein, and in many ways is like a trust. There are no shares, and it may be organized by one person. Rights in an *Anstalt* are freely transferable by written assignment.

6. As to venue, 28 U. S. C. § 1391(d) provides that "[d] An alien may be sued in any district."

trator, who served sequestration notices[7] upon the Delaware corporations, shares of stock or obligations of which were alleged in the affidavit to belong to defendants. As a result of the District Court's sequestration order, shares of stock and obligations[8] of three Delaware corporations belonging to the three *Anstalt* defendants was seized. Refusing to enter an appearance in the District Court, all defendants moved to quash the sequestrations and to dismiss the complaint.

On December 20, 1971 the District Court issued an order (71a-72a) vacating the sequestrations, upon the sole ground (84a) that the affidavit filed by the Trustees failed, in its view, to properly specify the property of each defendant sought to be seized, and that the omission of the information was not excused by giving the reasons for such omissions—a procedure authorized by Delaware Court of Chancery Rule 4(db).[9]

The Trustees appealed (69a-70a) from the District Court's order of December 20, 1971. They moved for

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7. Sub-paragraph 3 of Delaware Court of Chancery Rule 4(db) (90a) provides, in part, for seizure of intangible property by service of a notice upon the person, persons, or corporation "having possession or custody of the property or control of its transfer".

8. Defendants contend that the value of this property at the time of sequestration was in excess of $7 million.

9. Delaware Court of Chancery Rule 4(db), sub-paragraph (1)(b), provides that certain information "as to the property of each such defendant sought to be seized" shall be included in the affidavit, including "(3) The nature of the defendant's title or interest therein * * *." However, sub-paragraph (b)(1)(5) (89a) also provides that the affidavit shall include "The reason for the omission of any of the required statements" (89a), thus permitting omission of the information. Further, subparagraph (5) provides that "The Court may in its discretion and subject to statutory requirements dispense with or modify compliance with the requirements of any part of this rule in any cause upon application to it stating the reasons therefor." (91a).

a stay [10] in the Court of Appeals, which was granted on December 23, 1971 (67a-68a).

2. In the Court of Appeals.

A panel of the Court of Appeals on August 31, 1973 reversed the judgment of the District Court in a scholarly opinion written by Judge Adams for the majority (13a-42a); Judge Gibbons dissented (42a-66a). The majority did not agree with the sole ground of the District Court's ruling—the asserted insufficiency of the affidavit filed on behalf of the Trustees—and held the affidavit sufficient under Delaware law (18a-22a).

Meeting the first of defendants' constitutional attacks on the Delaware sequestration statute under the Fifth and Fourteenth Amendments, the majority held that the Delaware sequestration procedure represented an "extraordinary situation" within the meaning of *Fuentes v. Shevin*, 407 U. S. 67 (1972). The majority noted (27a-28a) that in *Ownbey v. Morgan*, 256 U. S. 94 (1920), this Court had upheld the constitutionality of the Delaware foreign attachment statute —a statute closely related to the sequestration statute— and that *Ownbey* was referred to by this Court in *Fuentes* as an example of such an "extraordinary situation."

With regard to defendants' attack on the sequestrations under the Fourth Amendment, the majority held that the Delaware sequestration procedure was not encompassed by the Fourth Amendment, relying

10. Without such a stay, defendants would have been free immediately to transfer the sequestered property, thereby defeating the jurisdiction of the District Court. The stay pending appeal was conditioned by the Court of Appeals upon the posting by the Trustees of a bond in the amount of $25,000.

upon *Boyd v. United States*, 116 U. S. 616 (1886) and *Wyman v. James*, 400 U. S. 309 (1971) (40a-41a).

Judge Gibbons dissented, asserting, in part, that the sequestrations were violative of the due process provisions of the Fifth and Fourteenth Amendments because Delaware lacks minimum contacts with either the subject matter or the parties (55a-66a).

The defendants filed a petition for rehearing in banc, urging review by the full court of what defendants described as "several major and novel issues as to constitutional matters on the frontiers of current constitutional litigation".[11] On October 10, 1973 the Court of Appeals granted (8a-9a) the defendants' petition for rehearing in banc.

After reargument, the Court of Appeals in banc [12] filed a *per curiam* opinion (6a-7a) stating simply that "the Court is evenly divided", and that the order of the District Court appealed from would be affirmed. The earlier reversal (10a-11a) of the order of the District Court, which resulted from the panel's decision was transformed—because of the equal division of the Court in banc on the constitutional issues which prompted the reargument—into an affirmance of the order of the District Court of December 20, 1971, vacating the sequestrations. Thus, because of the equal division of the eight Judges of the Court of Appeals on the constitutional issues involved, the order of the District Court, based upon alleged nonconformance of the Trustees' affidavit to the requirements of Delaware Court of Chancery Rule 4(db)—

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11. Petition of Appellees for Rehearing and Suggestion of Rehearing In Banc, p. 1.

12. The Court of Appeals in banc consisted of the nine active Judges with the exception of Judge Hunter who disqualified himself.

which ruling of the District Court the panel had held to be erroneous under Delaware law—was affirmed.

The Trustees then petitioned for a rehearing in banc, which the Court of Appeals in banc denied (2a-3a) on March 15, 1974. The Trustees also moved for a stay pending application to this Court for a writ of certiorari. Defendants opposed the stay, and demanded that any stay be conditioned upon the posting by the Trustees of a bond in the amount of $1 million. On April 1, 1974 the Court of Appeals issued an order (1a) granting the Trustees' motion for a stay pending the filing of this petition, and continuing in effect the $25,000 bond originally posted by the Trustees for the stay pending appeal, thus rejecting the defendants' demand for a $1 million bond.

REASONS FOR GRANTING THE WRIT.

I. The Court of Appeals In Banc Was Equally Divided on the Important Federal Constitutional Questions Involved.

1. The federal constitutional issues raised by defendants were briefed for—and argued—to the courts below. These issues were strenuously urged in defendants' petition for rehearing in banc. While the District Court's opinion rested upon the narrow ground of alleged noncompliance with the Delaware Court of Chancery Rule, the majority of the panel held the District Court's decision to be erroneous, and went on to decide the constitutional issues, in an opinion by Judge Adams, from which Judge Gibbons dissented. It is indisputable that the Court of Appeals granted defendants' petition for rehearing in banc in order to review the exceptionally important constitutional questions[13] involved, and which were again

13. Section M of the Internal Operating Procedures of the United States Court of Appeals for the Third Circuit (1974), recently published, describes what has been the Court's practice with regard to rehearing in banc:

M. Rehearing, Criteria and Practice for Voting for

1. General Criteria and Court Practice for Voting for Rehearing:

a. Granting of rehearing in banc is totally within the discretion of the cricuit judges of this Court in regular active service.

b. F. R. A. P. 35(a), hearing in banc or rehearing in banc, is not favored and ordinarily will not be ordered except

(1) where consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

(2) where the proceeding involves a question of exceptional importance.

c. This Court does not, ordinarily, grant rehearing in banc where the panel's statement of the law is correct and

raised by defendants in their petition for rehearing in banc. Were there any doubt, the fact that the Court of Appeals stayed the issuance of its mandate pending an application by the Trustees for a writ of certiorari, is further indication of its view that this case raises issues of exceptional importance, and "* * * is one likely, under [our] practice, to be taken up by us on certiorari * * *": *Magnum Import Co. v. De Spoturno Coty,* 262 U. S. 159, 163 (1922); *English v. Cunningham,* 80 S. Ct. 18 (1959) (Mr. Justice Frankfurter as Acting Circuit Judge); *Meredith v. Fair,* 306 F. 2d 374 (5th Cir. 1962).

And while the Court of Appeals in banc filed a *per curiam* opinion stating only that the eight Judges were equally divided—the earlier opinions of Judges Adams and Gibbons illuminate, in part, the reasons why four of the Judges were on one side, and four Judges were on the other side, of the federal constitutional issues involved.

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13. (Cont'd.)

the controverted issue is solely the application of the law to the circumstances of the case.

Third Circuit Rule 22, provides that after May 1, 1974 counsel for a petitioner for rehearing in banc shall make the following statement:

"I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to-wit, the panel's decision is contrary to the decision of the court or the Supreme Court in [citing specifically the case or cases] or, that this appeal involves a question of exceptional importance, to-wit [set forth in one sentence]."

The Court of Appeals would clearly not have granted defendants' petition for rehearing in banc merely to decide the non-constitutional questions in this case, since decision of such issues by the Court in banc would not have been necessary to secure *uniformity* of its decisions, nor did such issues involve *questions of exceptional importance.*

2. The constitutional validity of the Delaware sequestration procedure, additionally, is a matter of practical importance, not merely because of the pending sequestrations in the Delaware federal and state courts, but Delaware is the state of incorporation of a great number[14] of corporations and the potential use of the sequestration procedure is also great.

3. This Court should exercise its supervisory powers to decide the important federal constitutional questions which equally divided the eight Judges of the Court of Appeals in banc. Unless it does so, the District Court's order vacating the sequestrations will stand affirmed, thus defeating the jurisdiction of the District Court, permitting the defendants immediately to transfer their sequestered property, and leaving defendant Gotz enriched at the expense of the Trustees' Debtor.[15]

II. This Court Should Finally Settle the Issue Whether the Delaware Sequestration Procedure Violates the Due Process Provisions of the Fifth and Fourteenth Amendments Because It Authorizes the Seizure of Property Without Notice or Opportunity for Hearing.

1. Defendants contend that the Delaware sequestration statute violates their due process rights because their intangible property located in Delaware was seized without prior notice or an opportunity to be heard. Defendants rely upon *Fuentes,* 407 U. S. 67,

14. Probably 9,000 new corporations will be incorporated in Delaware during 1974; see Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L. J. 663, 668 (1974). It has been unofficially estimated that 75,000 corporations are incorporated in Delaware.

15. Gotz is reputed to be the owner of an international conglomerate valued at $500 million. New York Times, April 9, 1972, p. 40, col. 4.

in which this Court struck down Pennsylvania and Florida replevin statutes authorizing seizure of personal property without notice or an opportunity to be heard. This Court however also said in *Fuentes:*

> There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. *Boddie v. Connecticut,* 401 U. S., at 379. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. * * * [407 U. S. at 90-91 (footnotes omitted)]

In connection with these observations, this Court cited *Ownbey v. Morgan,* 256 U. S. 94, with approval, describing it as a case which involved "attachment necessary to secure jurisdiction in [a] state court—clearly a most basic and important public interest". *Fuentes,* 407 U. S. at 91, note 23. In *Ownbey* this Court had rejected a constitutional attack made upon the exercise of quasi in rem jurisdiction under Delaware's foreign attachment statute, and under that statute there was no pre-seizure notice or hearing.

2. The majority of the panel noted that *Ownbey* involved the Delaware foreign attachment statute, a

statute closely related to the Delaware sequestration statute, and that both in *Sniadach* and *Fuentes* this Court referred to *Ownbey* as an example of an "extraordinary situation" (27a). The majority said:

> * * * the continuing vitality of *Ownbey* is attested to by its presence in both *Fuentes* and *Sniadach*. Unless and until the Supreme Court reverses Ownbey this Court is duty bound to accord the case its full respect. (28a, n. 35)

The majority of the panel also pointed out (27a-28a) that references by this Court to *Ownbey* in *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969) and *Fuentes* had caused the Court of Appeals in *Lebowitz v. Forbes Leasing and Finance Corp.*, 456 F. 2d 979, 982 (3d. Cir.), *cert. denied*, 409 U. S. 843 (1972), to uphold the constitutionality of Pennsylvania's foreign attachment statute procedure against strong attack.

3. The Delaware sequestration statute provides that after a general appearance the seized property may be released, and in *Lebowitz* it was contended that after a general appearance there could no longer exist any justification for the attachment. The Court of Appeals for the Third Circuit, however, said in *Lebowitz* that it was bound by the decisions of this Court:

> But we are not free to adopt our own view as to post-appearance attachment. We say this because we think the reasoning of the Supreme Court's decisions in Ownbey v. Morgan, 256 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 837 (1921) and McKay v. McInnes, 279 U. S. 820, 49 S. Ct. 344, 73 L. Ed. 975 (1929) precludes such action. Any reexamination of the continuing vitality of these cases must come from the Supreme Court. [456 F. 2d at 982]

4. The Delaware sequestration statute comports with the tripartite test of due process established in *Fuentes*. First, this Court's footnote characterization of the attachment in *Ownbey* supplies the answer to the inquiry of whether the seizure was "directly necessary to secure an important governmental or general public interest." This is not a case like *Fuentes* where the statutes allowed private parties—serving their own private advantage—unilaterally to invoke state power to replevy goods from another. *Fuentes,* 407 U. S. at 93. A state has a legitimate interest in the exercise of judicial jurisdiction with respect to property within its borders. Seizure for the purpose of securing such jurisdiction accordingly serves a most basic and important public interest.

Second, there was a need for prompt action. Notice would afford the defendants an opportunity to defeat the state's interest in securing jurisdiction, by the simple expedient of transferring the property. This distinguishes this case from *Fuentes,* for here the State of Delaware's power to adjudicate was in jeopardy.

Third, Delaware has kept a "strict control over its monopoly" of force. This Court said in *Fuentes:*

> The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark. [407 U. S. at 93 (footnote omitted)]

Here, unlike *Fuentes,* the order effecting the seizure was issued by a District Court judge. That judge had been supplied with a complaint and with an affidavit. The information provided a basis for the determination by the District Court that the seizure would be in furtherance of the "important public interest" underlying the Delaware sequestration statute, and that prompt action would be required in order that the state's jurisdiction not be defeated.

This case does not present a situation where the State of Delaware has abdicated "effective state control over state power * * * [to] private parties, serving their own private advantage * * *". *Fuentes,* 407 U. S. at 93. The sequestration procedure here attacked also serves a public purpose as part of the ordered system of conflict resolution which includes the exercise of judicial power over property located within the state. *Lebowitz,* 456 F. 2d at 981.

5. The issue whether, under *Fuentes,* the Delaware sequestration procedure violates the due process provisions of the Fifth and Fourteenth Amendments because it involves a seizure without prior notice or opportunity for hearing—an issue on which the eight Judges of the Court of Appeals in banc split—should be finally settled by this Court.

III. This Court Should Finally Settle the Issue Whether the Delaware Sequestration Procedure Violates the Due Process Provisions of the Fifth and Fourteenth Amendments When the State Lacks Minimum Contacts With either the Subject Matter or the Parties.

1. Defendants assert that the sequestration of the property of a non-resident where Delaware lacks minimum contacts either with the subject matter or the

parties violates due process, an argument based upon *International Shoe v. Washington,* 326 U. S. 310 (1945). Defendants assert that a court cannot assert, even quasi in rem jurisdiction, unless either the parties or the subject matter of the action have minimum contacts with the forum. Judge Gibbons, in his dissent from the panel's opinion, accepted the defendants' contention that the minimum contacts analysis set out in *International Shoe* and developed in connection with in personam jurisdiction, constitutionally must also be applied to cases of quasi in rem jurisdiction. Thus, rejecting landmark decisions [16] of this Court—holding a state's power over persons or property within its boundaries is enough to establish quasi in rem jurisdiction—Judge Gibbons asserted:

> It is time that *Ownbey v. Morgan,* 265 [sic] U. S. 94 (1921), be considered in light of *International Shoe Co. v. Washington, supra,* and its progeny. There is no reason for considering the jurisdiction recognized in *Ownbey v. Morgan, supra,* as exempt from the stricture of the fifth and fourteenth amendment due process clauses. *Ownbey v. Morgan, supra,* and *International Shoe Co. v. Washington, supra,* cannot be reconciled if the former is not applied subject to a minimum contacts analysis * * * (65a)

2. Judge Adams—speaking for the majority of the panel—pointed out that the Trustees did have substantial contacts with Delaware, and that the valid state interests in protecting residents and affording a forum to litigate grievances could not be satisfied in case of

16. *Harris v. Balk,* 198 U. S. 215 (1905); *Chicago R. I. & P. R. Co. v. Sturm,* 174 U. S. 710 (1899); *Pennoyer v. Neff,* 95 U. S. 714 (1877).

defendants who could not be served in the United States in any less restrictive manner, and that, therefore, the procedure used was necessary to secure jurisdiction and was under the circumstances appropriate as a response to an "extraordinary situation" within the exception described in *Fuentes* (31a). After discussing the doctrines of *International Shoe, Hanson v. Denckla,* 357 U. S. 235 (1958), and *Ownbey,* Judge Adams observed:

> If consent to personal jurisdiction is the necessary implication of the entry of a general appearance, then application here of the "minimum contacts" tests seems misguided, and the *in terrorem* effect of the sequestration procedure might well pass constitutional muster. Ultimate resolution of this issue would depend, then, on which course of analysis a court were to pursue—the "voluntary contact" test of *International Shoe* and *Hanson* or the "implied consent" view of *Ownbey.* (36a) (footnotes omitted)

3. The minimum contacts doctrine is not applicable where, as here, the plaintiff invokes the quasi in rem jurisdiction of the court. Almost 60 years ago Justice Holmes declared that the "foundation of jurisdiction is physical power" over persons and property within a state's territorial borders. *McDonald v. Mabee,* 243 U. S. 90, 91 (1917).

4. Delaware's jurisdiction over intangibles—such as shares of stock of, or the obligations or debts of, a Delaware corporation—is based upon two Delaware statutes, the effect of which is to prevent such intangible property from ever being *embodied* in a document, which document might be physically located outside of the State of Delaware. Under 8 Del. C. § 169 (92a) the situs of shares of stock of a Delaware corporation is

regarded as Delaware, no matter where the share *certificates* may be located. Furthermore, the debts or obligations of a Delaware corporation also have their situs—as intangibles—within the State of Delaware.[17] Even when such intangibles may be regarded as "investment securities" within the meaning of the Uniform Commercial Code (UCC) (and, therefore, by definition "negotiable"), they, nevertheless, still have their situs in Delaware. Delaware—uniquely out of the 49 states which have adopted the UCC—is the only state which has rejected Section 8-317(1) in the form recommended by the UCC draftsmen (95a-96a), and in lieu thereof has enacted Section 8-317(1) of 5A Del. C. (93a-94a), which establishes the unique Delaware rule that such intangibles can never be embodied in a document. Thus, the intangible property of Delaware corporations—corporate stock and obligations—always has its situs *in* Delaware, no matter where the documents evidencing such intangibles may happen to be physically located.

5. The issue whether *Ownbey* must be read in light of *International Shoe,* that is, whether the doctrine of minimum contacts, which is applicable to in personam jurisdiction, also applies to quasi in rem jurisdiction—an issue on which the Court of Appeals in banc split—should be finally settled by this Court.

IV. This Court Should Settle the Question Whether the Sequestrations Constituted an Unconstitutional Search and Seizure.

1. Defendants argued in the courts below that the sequestration order "constituted a general warrant in

17. *Weinress v. Bland,* 71 A. 2d 59, 31 Del. Ch. 269 (Del. Ch. 1950); *Landau v. Best,* 187 A. 2d 75, 41 Del. Ch. 1 (Del. Supr. 1962).

its most obnoxious form, indeed precisely as that noxious instrument stood when it became the specific abuse against which the Fourth Amendment was directed."[18]

The majority of the panel held, however, that an examination of the early cases of this Court shows clearly that the protection of the Fourth Amendment does not extend to seizures of a civil nature. *Boyd v. United States,* 116 U. S. 616 (1886). Noting that while the concept of what constitutes a search or seizure impermissible under the Fourth Amendment has evolved significantly since the late nineteenth century, the majority said that "the path of that evolution has been neither so straight nor so exorable that it encompasses sequestration proceedings, at least at the present time." Compare *Camara v. Municipal Court,* 387 U. S. 523 (1967) with *Wyman v. James,* 400 U. S. 309 (1971). The majority also pointed out that the Court of Appeals in *Lebowitz* had summarily dismissed the same Fourth Amendment contention. 456 F. 2d at 980 (40a-41a).

2. In their petition for rehearing in banc defendants strenuously urged that the sequestrations in this case violated their Fourth Amendment rights, and that it is "well established" that the Fourth Amendment applies to civil actions:

> Contrary to the majority holding, it is well established that the Fourth Amendment applies to civil actions. *Camara v. Municipal Court,* 387 U. S. 523 (1967); *See v. City of Seattle,* 387 U. S. 541 (1967) * * *.[19]

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18. Brief for Fidel Gotz, et al., Defendants-Appellees 40-41.

19. Petition of Appellees for Rehearing and Suggestion of Rehearing In Banc, p. 13.

Defendants urged with respect to *Boyd* that:

> Furthermore, the statement relied upon by the majority from the *Boyd* case, decided in 1886, was not only mere dictum but is no longer the law, as the above decisions show. The Supreme Court plainly took the Fourth Amendment argument seriously in Fuentes (see f.n. 2.) * * * [20]

And defendants further urged with respect to *Wyman:*

> But *Wyman* dealt with the propriety of a requirement that a welfare caseworker make periodic visits to a recipient's home. The Court specifically reaffirmed that Fourth Amendment protections are not restricted to the criminal law field (400 U. S., at 317). It held that there was no "search" involved, and even if there were it was not unreasonable.[21]

3. The issue whether the sequestrations effected herein under the Delaware statute constituted an unreasonable search and seizure—an issue on which the Court of Appeals in banc split—should be finally settled by this Court.

---

20. *Ibid.*
21. *Id.* at 14.

CONCLUSION.

For the foregoing reasons this Court should grant the Trustees' petition for a writ of certiorari, settle the important constitutional issues on which the eight Judges of the Court of Appeals in banc were equally divided, and remand the case for further proceedings in the Court of Appeals.

Respectfully submitted,

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73-1600 FILE COPY

Supreme Court, U.S.
FILED
APR 25
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1600

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLARD WIRTZ, Trustees of the Property of the PENN CENTRAL TRANSPORTATION COMPANY,

Petitioners,

v.

FIDEL GÖTZ, VOLKER GÖTZ, FINANZ AKTIENGESELLSCHAFT, VILEDA ANSTALT, GÖTZ AKTIENGESELLSCHAFT OF ST. GALLEN (Also Known as GÖTZ AG OF ST. GALLEN, or GÖTZ ANSTALT OF ST. GALLEN, or GÖTZ ETABLISSEMENT OF ST. GALLEN, or GÖTZ ESTABLISHMENT OF ST. GALLEN), INTER-INDUSTRY AKTIENGESELLSCHAFT OF ST. GALLEN (Also Known as INTER-INDUSTRY AG OF ST. GALLEN, or INTER-INDUSTRY ANSTALT OF ST. GALLEN, or INTER-INDUSTRY ETABLISSEMENT OF ST. GALLEN, or INTER-INDUSTRY ESTABLISHMENT OF ST. GALLEN), INTER-MARKETING CORP. ANSTALT (Also Known as INTER-MARKETING CORP. ETABLISSEMENT, or INTER-MARKETING CORP. ESTABLISHMENT), MINOLTA ANSTALT, and FINANZ AG ST. GALLEN.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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TABLE OF CONTENTS OF SEPARATE APPENDIX.

Page

Order of the Court of Appeals Granting the Trustees' Motion for Stay Pending Application for a Writ of Certiorari ... 1a

Order of the Court of Appeals in Banc Denying the Trustees' Petition for Rehearing in Banc 2a

Judgment of the Court of Appeals in Banc 4a

Opinion of the Court of Appeals in Banc 6a

Order of the Court of Appeals in Banc Granting Defendants' Petition for Rehearing in Banc 8a

Judgment of the Panel of the Court of Appeals 10a

Opinions of the Panel of the Court of Appeals 12a

Order of the Court of Appeals Granting the Trustees' Motion for Stay Pending Appeal 67a

Trustees' Notice of Appeal to the Court of Appeals 69a

Order of the District Court 71a

Opinion of the District Court 73a

Federal Rule of Civil Procedure 4(e), 28 U. S. C. (1960, Cum. Ann. Pkt. Pt. 1974) 86a

Delaware Sequestration Statute, 10 Del. C. § 366 (1953, Cum. Supp. 1970) 87a

Delaware Chancery Rule 4(db), 13 Del. Code (1970) 89a

8 Del. C. § 169 ..... 92a

5A Del. C. § 8-317 ..... 93a

Section 8-317 of the Uniform Commercial Code Recommended by the Draftsmen Thereof 95a

Fourth Amendment to the Constitution of the United States .. 97a

Fifth Amendment to the Constitution of the United States ... 98a

Foureenth Amendment (Section 1) to the Constitution of the United States 99a

Staff Report of the Committee on Banking and Currency 100a

ORDER OF THE COURT OF APPEALS GRANTING THE TRUSTEES' MOTION FOR STAY PENDING APPLICATION FOR A WRIT OF CERTIORARI.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-2150.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY,
Appellants

v.

FIDEL GOTZ, ET AL.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until April 25, 1974, and it is

FURTHER ORDERED that no final judgment in mandate form having issued, the $25,000 security heretofore filed in connection with the stay shall continue to constitute security in connection with the petition for certiorari.

/s/ COLLINS J. SEITZ,
Chief Judge.

Dated: April 1, 1974

ORDER OF THE COURT OF APPEALS IN BANC DENYING THE TRUSTEES' PETITION FOR REHEARING IN BANC.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-2150.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY,
Appellants

v.

FIDEL GOTZ, ET AL.

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS and GARTH, *Circuit Judges.*

The second petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

COLLINS J. SEITZ,
Judge.

Dated: March 15, 1974

JUDGMENT OF THE COURT OF APPEALS IN BANC.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-2150.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY,
Appellants

v.

FIDEL GOTZ, ET AL.

(D. C. Civil Action No. 4072)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Present: SEITZ, *Chief Judge* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS and GARTH, *Circuit Judges.*

JUDGMENT ON REHEARING.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was reargued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 20, 1971, be, and the same is hereby affirmed and the stay previously granted by this Court is hereby vacated. Costs taxed against appellants.

ATTEST:

THOMAS F. QUINN,
Clerk.

February 21, 1974

OPINION OF THE COURT OF APPEALS IN BANC.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-2150.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY,
Appellants

v.

FIDEL GOTZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.
(C. A. No. 4072)

Argued April 9, 1973
Before VAN DUSEN, ADAMS and GIBBONS,
Circuit Judges.

Reargued In Banc November 16, 1973.
Reargued before SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS and GARTH, *Circuit Judges.*

Edwin P. Rome
Marvin Comisky
Morris L. Weisberg
William E. Taylor, Jr.
Attorneys for Appellants

Arthur G. Connolly
Attorney for Appellees

OPINION OF THE COURT.

(Filed February 21, 1974)

PER CURIAM:

On this appeal from the order dated December 20, 1971, the Court is evenly divided.

The order will be affirmed and the stay heretofore entered will be vacated.

ORDER OF THE COURT OF APPEALS IN BANC GRANTING DEFENDANTS' PETITION FOR REHEARING IN BANC.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-2150.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY,
Appellants,

v.

FIDEL GOTZ, ET AL.
Appellees.

Present: SEITZ, *Chief Judge* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS and GARTH, *Circuit Judges.*

ORDER.

The Petition for Rehearing filed by defendant-appellees in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the Circuit in regular active service, and a majority of such active circuit judges having voted for rehearing in banc, it is

ORDERED that the Petition for Rehearing in banc is granted, and the judgment of this court entered on August 31, 1973, is vacated, and it is

FURTHER ORDERED that the Clerk of this Court shall list this appeal for rehearing or reconsideration before the court in banc at the convenience of the court.

By THE COURT,

COLLINS J. SEITZ,
Chief Judge.

DATED: October 10, 1973.

JUDGMENT OF THE PANEL OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-2150.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY,
Appellants

v.

FIDEL GOTZ, ET AL.

(D. C. Civil Action No. 4072)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Present: VAN DUSEN, ADAMS and GIBBONS,
Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed December 20, 1971, be, and the same is hereby reversed and the cause is remanded for action consistent with the opinion of this Court. Costs taxed against appellees.

ATTEST:

/s/ M. ELIZABETH FERGUSON,
Chief Deputy Clerk.

August 31, 1973

OPINIONS OF THE PANEL OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-2150.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY,
Appellants

v.

FIDEL GOTZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.
(C. A. No. 4072)

Argued Monday, April 9, 1973.
Before: VAN DUSEN, ADAMS and GIBBONS,
Circuit Judges.

Edwin P. Rome
Marvin Comisky
Morris L. Weisberg
William E. Taylor, Jr.
Attorneys for Appellants

Arthur G. Connolly
Attorney for Appellees

Opinion of the Court.

(Filed August 31, 1973)

ADAMS, *Circuit Judge:*

The Trustees of the Penn Central Transportation Company (Trustees) appeal to this Court from an order of the district court vacating a sequestration attempted by the Trustees against the property of defendant-appellees Fidel Gotz, his son Volker Gotz, and a number of corporations alleged to be controlled by Gotz.[1] All of the defendants "are citizens of foreign states and reside in Continental Europe." In granting the defendants' motion to vacate, the district court did so on the basis that the Trustees had failed to conform fully to the required procedures.

The underlying dispute, from which this case arose, involves an alleged conspiracy between Gotz and several of the defendant corporations. Through the conspiracy Gotz allegedly caused $4,000,000., belonging to the Penn Central, deposited in a Lichtenstein bank, to be converted to the use of Gotz and the corporations in which he had an interest. The activity involved occurred before the entry of the Penn Central into re-

1. Sequestration is a procedure for compelling the appearance of a defendant. In its operation, it is similar to the more common procedure of foreign attachment. In each, the plaintiff commences the suit by requesting that a judicial officer seize the property of an out-of-state defendant. The defendant is given notice of the seizure and is advised that unless he appears to defend the action, the property seized will be awarded to the plaintiff by default.

Delaware has both sequestration and foreign attachment, the primary difference being that foreign attachment is an action at law while sequestration is effected in Chancery. *See generally*, E. Folk, The Delaware General Corporation Law, Appendix I at 569-71 (1972).

Because of the similarity of the two actions, they will be referred to at times interchangeably in the third section of this opinion.

organization. The Trustees, not surprisingly, sought to recover this amount.

I.

To commence the recovery litigation, the Trustees filed a complaint in the federal district court, with jurisdiction based on diversity of citizenship. Rule 4(e) of the Federal Rules of Civil Procedure provides that:

> "Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."

Because Rule 4(e) adopts for the district courts the rules of the state in which the district court in question is located, the Trustees sought to effect service on the defendants through the Delaware sequestration provisions.[2]

In broad outline, the Delaware sequestration procedure is as follows: The sequestration statute, 10 Del. C. § 366, provides that if in a complaint filed in the

2. Rule 4(e) was incorporated into the Federal Rules of Civil Procedure in 1963. Prior to the rule's adoption, actions *quasi in rem* could not be commenced in the federal courts, though actions begun in that manner in state courts could be removed to federal court. The 1963 amendment enacting rule 4(e) cured this anomalous situation. 4 Wright & Miller, Federal Practice and Procedure § 1119 (1969).

Court of Chancery, it appears that the defendant is a non-resident of Delaware, the Court may order such defendant to appear. Such appearance may be compelled by the seizure of all or any part of the defendant's property. Such seizure is carried out by an officer of the court. The defendant whose property is seized is given notice of the commencement of the proceedings by mail, if feasible, and also by publication. If he does appear, the seizure may be dissolved, but the defendant has then submitted to *in personam* jurisdiction.

Delaware Chancery Rule 4(db), promulgated pursuant to section (b) of the statute limits the use of the sequestration proceeding. To utilize sequestration, the plaintiff must supply an affidavit which is to include, inter alia, a description of the property to be seized, specifying the amount, the nature of defendant's title, and the source of the affiant's information. If any information is omitted, the affidavit must contain the reason therefor.

Sequestration in Delaware may be made of property not susceptible of physical seizure. And this provision has been interpreted to permit seizure of certain equitable interests, so long as the interests are capable of being sold.[3]

Employing this Delaware procedure, the Trustees, on March 10, 1971, filed in the district court a complaint requesting sequestration of the property of the non-resident defendants. That same day, the district court entered a sequestration order and gave notice to the defendants that they were to appear to defend by April

3. 8 Del. C. § 169 (Cum. Supp. 1968). *See* Green v. Johnston, 99 A. 2d 627 (1953). The statute and regulation have been interpreted to mean that shares of a Delaware corporation, held by a non-resident, with the certificates evidencing the interest out-of-state, are nonetheless seizable. Such seizure is accomplished by notifying the transfer agent.

22, 1971. Pursuant to the order, debentures, warrants and notes held by the defendants in Delaware corporations were seized.

On March 22, 1971, the Trustees filed an amended complaint, again seeking sequestration. Pursuant to the amended complaint, notice was sent to the defendants requiring that they appear on May 4, 1971. The defendants did not do so by April 22, 1971, the deadline established by the original complaint. They did, however, file a motion to quash the sequestration before May 4, 1971, the deadline created by the second, or amended, complaint. Between April 22nd and May 4th the Trustees obtained, from a deputy clerk, a default against the defendants who had failed to appear by April 22nd. The defendants moved to vacate that default, and such motion was granted by order of the district court dated December 3, 1971. In view of the confusion created by the two complaints served on defendants, and since the defendants did appear by May 4th, and bearing in mind this Court's "reluctance to permit the final disposition of substantial controversies by default"[4] and the high standard necessary to reverse an order in a default situation,[5] we affirm the vacation of the default.

Responding to the order to appear, the defendants on May 4, 1971, filed a motion to quash the sequestration or to dismiss the action for lack of jurisdiction. On December 20, 1971, the district court granted the motion to quash but denied the motion to dismiss. The Trustees appealed from the granting of the motion to quash. It is to that issue that we must address our attention.

4. Hutton v. Fisher, 359 F. 2d 913, 916 (3d Cir. 1966).

5. To reverse a district court's action in a matter of this sort, this Court must find that there was an abuse of discretion. Tozer v. Charles A. Krause Milling Co., 189 F. 2d 242, 246 (3d Cir. 1951).

II.

The able and experienced district judge, granting the motion to quash the sequestration, focused on a narrow question of Delaware law,[6] and found that the affidavit filed in support of the sequestration request was inadequate.

As stated earlier, the procedure to be employed in effectuating service under the sequestration statute, 10 Del. C. § 366, is set forth in Chancery Rule 4(db). In pertinent part, that Rule states:

> "(db) *Service by Publication and Seizure.* (1) No order shall be entered under 10 Del. C. § 366 unless it appears in the complaint that the defendant or any one or more of the defendants is a non-resident of the State of Delaware and the application therefor is accompanied by the affidavit of a plaintiff or other credible person stating:
>
> "(a) As to each non-resident defendant whose appearance is sought to be compelled, his last known address or a statement that such address is unknown and cannot with due diligence be ascertained.
>
> "(b) The following information as to the property of each such defendant sought to be seized:
>
> "(1) A reasonable description thereof.
>
> (2) The estimated amount and value thereof.

6. State law is controlling on questions concerning the state procedure adopted by the Federal courts pursuant to F. R. Civ. P. Rule 4(e). *E.g.* Farrell v. Piedmont Aviation, Inc., 295 F. Supp. 228 (S. D. N. Y. 1968) *aff'd* 411 F. 2d 812 (2d Cir.), *cert. denied,* 396 U. S. 840 (1969).

(3) The nature of the defendant's title or interest therein; and if such title or interest be equitable in nature, the name of the holder of the legal title.

(4) The source of affiant's information as to any of the items as to which the affidavit is made on information and belief.

(5) The reason for the omission of any of the required statements.

* * * * * * * *

(5) The court may in its discretion and subject to statutory requirements dispense with or modify compliance with the requirements of any part of this rule in any cause upon application to it stating the reasons therefor."

The two sections of the Rule most germane to this appeal are subsection (1)(b)(5) and section (5).

Pursuant to the Rule's directive, the Trustees submitted an affidavit. It set forth that defendant Fidel Gotz, his son, or one or more of his alter ego corporations held notes or shares in thirteen Delaware corporations. Regarding several but less than a majority of these corporations, the affidavit stated the estimated amount and value of the defendants' holdings. The exact nature of the defendants' title was not specified, and the identity of which specific defendant was the holder of the interest in any of the corporations was not stated.

Affiant sought to overcome these deficiencies by furnishing, as provided for in section (1)(b)(5), a statement of the reasons for the omissions. Aware of the shortcomings of his affidavit, the affiant ascribed

the omissions to the complete control over the information retained by Fidel Gotz.[7]

The property located and seized by the sequestrator was possessed by Inter-Marketing Corp., Minolta Corp. and Vileda Corp., three of the defendant corporations.

The district court, noting that the affidavit did not specify that any of the three named corporate defendants did possess the specific property seized, ruled that the affidavit was insufficient to support the sequestration.

Holding that section (1)(b)(5) permitted only the omission of statements required by subsections (1)(b)(1)-(4), the district court concluded that denominating the specific possessor defendant was a requirement not of those subsections but a general requirement of section (1)(b) and therefore not curable under (1)(b)(5). That subsection being unavailable to the plaintiffs, the district court then turned to section (5) of the Rule which gives the court discretion, upon application by the plaintiff, to dispense with other requirements.

The district court refused to consider whether it was proper to dispense with other requirements because it found that application had not been made for the dispensation. This finding was made by the district court despite the fact that a different judge of the district court had granted the original sequestration request. Underlying the action of the second district judge in quashing the sequestration was a desire to

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7. For example, the affidavit stated:

"Affiant is unable to state the value of any of the property owned by any of said defendants . . . because that information is peculiarly within the knowledge of said defendants and the corporation whose shares, notes, debentures, debts and contract obligations are involved."

prevent the use of the sequestration statute for "fishing expeditions," attempts by individuals to commence harassing litigation by making sweeping claims and alleging that the defendant owns property in one or more of a large number of companies. Such abuse had been common prior to the adoption of Rule 4(db),[8] and the district court expressed a fear that if this affidavit were held adequate because of either section (1)(b)(5) or section (5), there would be a return to dragnet-type seizures.

This Court holds that, under the circumstances of this case, the affidavit submitted was sufficient to support the sequestration.[9] The danger of a "fishing expedition" is not present when, as in this case, the affiant endeavors to attain the maximum possible degree of specificity, and additional precision is beyond the affiant's facilities, because of the complex inter-corporate activities of multiple interrelated defendants. Along much the same line, the affiant has asserted that the corporations holding the legal title of the shares are but alter egos of the principal defendant. Thus, for the purpose of protecting against dragnet seizures, there may be considered to be one defendant with many facets. On these bases, the fears of the district court would not appear to be well-founded in this case.

Further, a reversal of the order quashing the sequestration appears supported in part by our reading of Delaware case law, specifically *Rebstock v. Lutz,* 158 A. 2d 487 (1960). In that case, the plaintiffs, minority

8. *See* Cantor v. Sachs, 162 A. 73 (Del. Ch. 1932).

9. There were actually two affidavits submitted, one in connection with the complaint filed March 10 and one with the amended or second complaint filed March 22. Since the district court did not deal explicitly with one or the other, we have treated the affidavits as one, as did the district court.

shareholders, commenced a suit against directors of a corporation by seeking to sequester shares held by the directors in three Delaware corporations. The complaint named nineteen individual defendants, but the accompanying affidavit specified neither who among defendants held shares in the three corporations nor the amount of the holdings of any of the defendants. The affidavit alleged, pursuant to subsection (1)(b)(5):

> "Deponent cannot state or estimate the number of shares owned by each of the individual defendants and the defendants named as co-partners in Model, Roland & Stone because the information is available only to the respective defendants or to the corporation whose shares are involved."[10]

The subsequent seizure revealed that five of the individual directors held shares in the three designated corporations.

Under these facts, the defendants moved to vacate the seizures. Their motion was denied by the Chancellor,[11] and the denial was affirmed by the Supreme Court of Delaware. The Supreme Court held that (1)(b)(5) was designed to allow omissions if explained, and in *Rebstock,* as in this case, one of the omissions was the failure to specify which among numerous defendants possessed shares of any of three corporations. The Delaware court further held that section (5) was not the sole remedy for this type of omission.

It is with some hesitancy that this Court reverse a ruling on Delaware law made by an experienced Delaware district court judge. Nonetheless, given the re-

10. Rebstock v. Lutz, 158 A. 2d 487, 490 (1960).

11. Lutz v. Boas, 156 A. 2d 96 (1959).

semblance between *Rebstock* and the present case, this Court holds that the affidavit filed here is sufficient under Delaware law.[12]

The defendants have asserted several other grounds on which the vacation of the sequestration order can be sustained.[13] One of these grounds, that the Delaware sequestration statute is unconstitutional, raises difficult questions dealt with in section III. One other ground appears not insubstantial, and we shall now consider it briefly.

The return of the sequestrator showed that the following securities had been seized:

(a) 30,000 SSI Computer Corp. common stock purchase warrants.

(b) $1,000,000 principal amount 7% subordinated note, SSI Computer Corp. (now Itel Computer Leasing Corporation).

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12. The dissent asserts that this holding constitutes a "specious refutation" of the district court and that reliance on *Rebstock* is not warranted.

The procedure apparently employed in *Rebstock* consisted of the filing of affidavits asserting that each of nineteen defendants owned an unknown number of shares in one or more of several corporations. The return of the sequestrator revealed that five of the nineteen defendants held shares in the named corporations. Thus, as to many if not all of the remaining fourteen defendants, any affidavit asserting that the defendant owned an unknown number of shares would appear to be a misstatement. In the present case, there was no allegation that a particular defendant, among the inter-related corporate defendants, was the owner of a particular number of shares.

Between the procedure here, and that employed in *Rebstock*, it is difficult to determine which produced more of the "beating of the bushes," so criticized by the dissent. Here, at least, the affidavits submitted would appear to be free of misstatement.

13. On appeal, the appellate court must affirm the decision of the lower court, if correct, although the lower court relied on a different and incorrect ground. Helvering v. Gowran, 302 U. S. 238, 245 (1937).

(c) 50 shares of SSI Computer Corp. common stock (now Itel Computer Leasing Corp.).

(d) 25,360,500 (Swiss francs) principal amount 8% notes of Textron Atlantic, Inc.

(e) $500,000 principal amount of SSI Computer Corp. debentures (now Itel Computer Leasing Corporation).

(f) 10,000 Itel warrants.[14]

Various types of securities are present in this listing. The sequestration statute does not, by its terms, define what is property seizable under the statute. Shares of common stock of Delaware corporations are seizable property;[15] securities representing a debt owed to a non-resident by a Delaware corporation vary as to whether they are seizable.

> "A debt owed to a nonresident of Delaware is sometimes subject to sequestration in order to compel his appearance in the Delaware courts. The key consideration is whether the debt is represented by a negotiable instrument. If it is negotiable, then it does not have a Delaware situs and may not be seized. In other words, unlike stock of a Delaware corporation, the situs of a negotiable bond issued by a Delaware entity is not Delaware but follows the certificate. On the other hand, if the indebtedness is represented by a non-negotiable instrument, then it is like any other debt and retains a Delaware situs and may thus be seized under sequestration process.[16]

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14. Baker v. Gotz, 335 F. Supp. 197, 199 (D. Del. 1971).

15. 8 Del. C. § 169.

16. E. Folk, *supra* note 1 at 592. (Footnote omitted)

The Trustees argue that this distinction between negotiable and non-negotiable securities has not survived Delaware's modification of the Uniform Commercial Code.[17] They contend that this alteration indicates that all securities are seizable. The defendants, however, assert that the alteration merely preserves the existing Delaware judicial rules determining seizability. Professor Folk agrees with the interpretation suggested by the defendants.[18]

The district court did not determine which, if any, of the securities seized are negotiable. Such resolution, since it may involve a question of fact, is, in the first instance, properly made by the district court.[19] If the

17. Section 8-317(1) of the Uniform Commercial Code as generally adopted provides:

> "(1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source."

Delaware, however, has enacted a different provision. 5A Del. C. § 8-317(1) states:

> "(1) Nothing contained in this title shall repeal, amend or in any way effect (sic) the provisions of sections 169 and 324, title 8, or sections 365 and 366, and chapter 35, title 10; and to the extent that any provision of this title is inconsistent with such sections, sections 169 and 324, title 8, and 365 and 366 and chapter 35, title 10, shall be controlling."

The Trustees argue that this section indicates that sequestration may be had of any type of property, regardless of whether that property is embodied in a negotiable instrument. The defendants, on the other hand, contend that this section merely carries forward established Delaware law on what items are seizable.

18. E. Folk, *supra* note 1 at 592, n.160. The distinction based on the negotiability rule was enunciated in *Landau v. Best*, 187 A. 2d 75 (1962). There does not appear to be a post-UCC case dealing with this question.

19. The dissent suggests that there should not be a remand on this issue, because only "phantom facts" remain to be found by the district court. However, this Court, as an appellate tribunal, does

district court determines that these securities are not negotiable, that will conclude this aspect of the inquiry, since non-negotiable securities would be sequesterable under the statutory construction advanced by either party. Only if the securities are found to be negotiable will statutory interpretation be required. Thus, it would not appear that the question is ripe for adjudication, and, therefore, it will be deferred pending the district court's factual determination, and if necessary, its construction of the Delaware statute.[20]

The defendants, however, concede that the 50 shares of SSI Computer Corp. (now Itel Computer Leasing Corp.) (item (c)), are seizable under the Delaware sequestration statute.[21] This seizure appears unassailable insofar as Delaware law is concerned. Thus, there remains property which has been properly seized according to the Delaware sequestration statute. For that reason, this Court must perforce proceed to meet the challenges raised to the constitutionality of the statute itself.[22]

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19. (Cont'd.)

not have before it the instruments embodying the interests seized, nor an exact description of those interests. While the determination of the negotiability of these instruments requires an application of law, the law must be applied to facts, And these facts have not yet been developed. Indeed, were we to make a decision now, we might be more validly charged with deciding on the basis of phantom facts.

20. On remand, the district court should consider Gotz's argument that the $500,000 principal amount, SSI Computer Corp. debentures (item (e)) are not seizable because they were sold prior to the sequestration. This question need not be reached if the debentures are found to be negotiable and held to be not seizable under Delaware law.

21. Brief of Appellee at 29.

22. The defendants also urge that the Trustees' action is basically at law, not in equity, and consequently could not be brought in the Delaware Court of Chancery. They further contend that because sequestration is available only in Chancery, that procedure should not

III.

Having found that the sequestration order was proper under Delaware law, the Court must now proceed to the contention of the defendants that the seizing of their property by sequestration, prior to a hearing, violated due process.[23]

In considering the constitutionality of the state procedure, it is important to bear in mind that this Court's task is not to assess the wisdom of a procedure characterized by some as a "bludgeon." Rather, our assignment is limited to measuring the state statute and rules against the decisions of the Supreme Court delineating the elements of due process.

The recent cases of *Sniadach v. Family Finance Corp.*[24] and *Fuentes v. Shevin*[25] provide the benchmark against which prehearing seizures must be gauged.[26]

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22. (Cont'd.)

be available to a plaintiff in a federal court whose action sounds at law. This contention of the defendants must be weighed against the Trustees' assertions that their action is in equity since it seeks an accounting and imposition of a constructive trust and involves complex accounting and allegations of fraud. The Trustees also suggest that there is no longer a sharp cleavage in the federal courts between law and equity and that Rule 4(e) permits utilization of state procedures in any federal action, since all are denominated civil actions. Rule 2 F. R. Civ. P. This dispute has not been resolved by the district court and, in view of this Court's disposition of the case, our resolution of the question at this time would appear to be premature.

23. Because of the incorporation of the state procedure provision on F. R. Civ. P. 4(e), Gotz's claim must be primarily that his Fifth Amendment right to due process is being abridged, and secondarily that the underlying state statute deprives him of rights secured under the Fourteenth Amendment.

24. 395 U. S. 337 (1969).

25. 407 U. S. 67 (1972).

26. *See* E. Folk & P. Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 Colum. L. Rev. 749 (1973) (hereinafter Folk & Moyer).

Although both *Sniadach* and *Fuentes* dealt with seizures from persons at the lower end of the economic spectrum,[27] *Fuentes* makes clear that the principle enunciated is wide-ranging in its application.[28] The basic holding of these two cases is that unless, as the Supreme Court stated, "extraordinary situations" obtain, absent notice and a prior hearing, pre-judgment seizures of property violate fundamental tenets of due process.[29] Since the Delaware procedure utilized here is essentially a pre-judgment seizure, the question becomes whether, nonetheless, it is permissible because of the presence in this case of an extraordinary situation.

Both *Sniadach* and *Fuentes* set forth examples of the type of situations the Supreme Court considers extraordinary.[30] In both cases, *Ownbey v. Morgan*[31] was referred to as an exemplar of such a circumstance.[32] *Ownbey* involved the Delaware foreign attachment statute, a statute closely related to the sequestration statute challenged here. The Supreme Court's citation to

27. In *Sniadach* the seizure challenged was the garnishment of wages for non-payment of debt. In *Fuentes* the ancient practice of replevin was attacked. Both of these procedures are commonly applied against the poor who are unable to meet installments due on credit purchases.

28. Prior to *Fuentes* two lines of cases had developed, one line holding that *Sniadach* was a bar to virtually all prehearing seizures, the other line limiting *Sniadach* to situations akin to wage garnishments. *Compare e.g.* Black Watch Farms v. Dick, 323 F. Supp. 100 (D. Conn. 1971) *with e.g.* Swarb v. Lennox, 314 F. Supp. 1091 (E. D. Pa. 1970), *aff'd* 405 U. S. 191 (1972).

29. 395 U. S. at 339, 342; 407 U. S. at 90.

30. The Court in *Fuentes* indicates that extraordinary situations permitting prehearing seizures, include collection of the internal revenue, assistance to the war effort, and protection against an imminent bank failure, contaminated food and misbranded drugs. 407 U. S. at 91-2.

31. 256 U. S. 94 (1921).

32. 395 U. S. at 339; 407 U. S. at 91, n. 23.

Ownbey led this Court, in *Lebowitz v. Forbes Leasing and Finance Corp.*,[33] to uphold the constitutionality of Pennsylvania's foreign attachment procedure,[34] in the face of a strong challenge.[35]

Although it might be contended that the Court, now, could hold that *Lebowitz* is binding in this case,[36] and on that basis sustain the Delaware statute, an explication of the considerations that must be balanced in this due process challenge lead to the same conclusion, sustaining the Delaware procedure as applied in this case.

The question that must be posed is, assuming an encroachment upon one' right, what is the legitimate state interest justifying such a burden. In a typical case of foreign attachment or sequestration, the state's interest may not be of such magnitude to override the right to a pre-seizure hearing.[37] That question need

33. 456 F. 2d 979 (3d Cir.), *cert. denied*, 409 U. S. 843 (1972).

34. P. R. Civ. P. 1251-79, 1285-92.

35. The difficulty this Court had in reconciling the *Ownbey* citation with the philosophy of *Sniadach* can be seen in both the majority opinion, by Chief Judge Seitz, and the concurring opinion, Judge Gibbons. 456 F. 2d at 982-3. However, the continuing vitality of *Ownbey* is attested to by its presence in both *Fuentes* and *Sniadach*. Unless and until the Supreme Court reverses *Ownbey* this Court is duty bound to accord the case its full respect.

36. This Court's prior reliance on *Ownbey* has been criticized in two thoughtful recent notes. *See* Comment, *Foreign Attachment After Sniadach and Fuentes*, 73 Colum. L. Rev. 342 (1973); Comment, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 Yale L. J. 1023 (1973).

37. The Supreme Court's language indicates that extraordinary circumstances must be present to permit a prehearing seizure. In determining whether there is an extraordinary circumstance, the focus is directed to the interest of the state in conducting such a summary proceeding. Therefore, whether the analysis is denominated a search for extraordinary circumstances or a balancing under due process, the final inquiry remains the extent and importance of the state's interest.

not be decided at this point, for this is not the typical foreign attachment or sequestration case.

It is crucial to recall that the defendants cannot be located within the United States and are not liable to *in personam* service under the applicable Delaware statutes.[38] Thus, the constitutional challenge becomes more circumscribed, for if the procedure is constitutional as applied to the defendants, further examination of it would be impermissible.

> "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."[39]

Several interests of the state are frequently asserted as the bases for justifying foreign attachments, or, as in this case, sequestration. These interests include: protecting state residents by affording them a forum;[40] insuring that a fund be available from which a judgment may be satisfied;[41] reducing or eliminating extended litigation arising from attempted long-arm service;[42] and the more metaphysical interest of the

38. Delaware has a rather limited "long-arm" statute for securing jurisdiction. 10 Del. C. § 3104, 8 Del. C. § 343.

39. United States v. Raines, 362 U. S. 17, 21 (1960). *Raines* involved a Federal statute, but the rule clearly applies to state statutes, *see e.g.* Yazoo v. Mississippi Valley R. Co. v. Jackson Vinegar Co., 226 U. S. 217 (1912). The presence of both Federal and state rules or statutes in this case, *see* note 20, *supra*, does not affect the pertinence of this mandate.

40. *See* Lebowitz v. Forbes Leasing and Finance Corp., 326 F. Supp. 1335, 1348-9 (E. D. Pa. 1971) *aff'd* 456 F. 2d 979 (3d Cir.), *cert. denied*, 409 U. S. 843 (1972).

41. *See id.* at 1349. *See also*, Comment, 73 Colum. L. Rev. at 347-8.

42. *See* Lebowitz v. Forbes Leasing and Finance Corp., 456 F. 2d 979, 982 (3d Cir.), *cert. denied*, 409 U. S. 843 (1972).

state in exercising its power as sovereign over property within its jurisdiction.[43]

Were the defendants here amenable to service pursuant to a Delaware statute or, even if the defendants were not liable to suit in Delaware but were liable in another state of the Union, we would be presented with not inconsideraable difficulty in holding that these asserted state interests outweigh the right of the property owners to notice and a hearing prior to being deprived, even temporarily, of their property.[44]

Gotz, his son, and the alter ego corporate defendants named in the complaint are all "citizens of foreign states and reside in continental Europe."[45] As such, they are not liable to effective service by or in the United States, either under a Delaware statute or by proceedings brought in a sister state.

The plaintiffs are trustees of a corporation that is incorporated in Delaware, has extensive power in Delaware, and conducts a significant amount of busi-

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43. U. S. Industries v. Gregg, 348 F. Supp. 1004, 1019-21 (D. Del. 1972).

44. In the usual situation, many of the state's objectives can be achieved without causing the deprivation of rights associated with prehearing seizures. If the potential defendant is amenable to service *in personam*, that proceeding might be sufficient to provide resident plaintiffs with a local forum. Similarly, if the case were between two local residents there would be no permissible summary procedure for seizing a fund prior to judgment. If the defendants were out-of-state, proceedings under the Uniform Enforcement of Judgments Act, *e.g.* 12 P. S. §§ 921-928 (Pennsylvania), or pursuant to the full faith and credit clause, U. S. Const. Art. IV § 1, would provide the plaintiff with the means to satisfy any judgment obtained.

From these illustrations, it becomes clear that the presence of less restrictive, alternative means to legitimate state ends might present serious questions concerning the continued viability of these procedures in the normal situation. *Compare* Folk & Moyer, 73 Colum. L. Rev. at 759-68.

45. Baker v. Gotz, 336 F. Supp. at 200.

ness in Delaware.[46] In view of the fact that the plaintiffs here do have substantial contacts [47] with Delaware, and that the valid state interests in protecting residents and affording a forum to litigate grievances cannot be satisfied in the case of defendants who cannot be served in the United States in any less restrictive manner, the procedure used here is necessary to secure jurisdiction and under the circumstances appropriate as a response to an extraordinary situation within the exception described in *Sniadach* and *Fuentes*.[48] Therefore, we hold that, as applied in this case, the absence of a pre-seizure hearing in the Delaware sequestration procedure does not violate due process.[49]

The foregoing conclusion is, of course, bottomed on the premise that Delaware may, consistent with due process, provide a forum for the adjudication of the Trustees' claim.[50] The defendants contest this premise,

46. The main line of the debtor-corporation's Eastern corridor passenger and freight service runs through Delaware.

47. Whether the state has a legitimate interest in providing out-of-state plaintiffs a forum to sue out-of-state defendants is a question which we do not reach. Here, the plaintiffs have sufficient ties in Delaware to be considered not out-of-state. *See generally* International Shoe Co. v. Washington, 326 U. S. 310 (1945).

48. The use of *Ownbey* in the *Fuentes* case as an example of an extraordinary situation has drawn some skeptical comment. *See* Comment, 73 Colum. L. Rev. at 344-7. Comment, 82 Yale L. J. at 1025-6. However, as applied to the facts of a case similar to this, the import of the citation is clear. Here, the prehearing seizure is justifiable because it provides the only means for the state to gain jurisdiction over a suit appropriately brought in its court.

49. *Accord*, Gordon v. Michel, 297 A. 2d 420 (Del. Ch. 1972).

50. In this point, the discussion has addressed the question whether due process requires a pre-seizure hearing. Analysis has been focused on the presence or absence of "extraordinary situations." The conclusion has been reached that the non-availability of the defendants in the United States presents an extraordinary situation.

This same non-availability of the defendants raises questions concerning the propriety of adjudicating this claim in Delaware. The

asserting that any attempted exertion of jurisdiction over them by Delaware would be, in reality, nothing short of an exercise of *in personam* jurisdiction. Since the exercise of *in personam* jurisdiction raises the specter of a judgment not limited by the value of their property, defendants contend that the procedure is unconstitutional.

The highest court of Delaware has, in fact, indicated that the sequestration procedure, once properly instituted, leaves a defendant only the choice between defaulting, and thus forfeiting the property seized, or entering a general appearance to defend on the merits.[51] A general appearance subjects a defendant to the *in personam* jurisdiction of the court; thus, defendants argue, the Delaware procedure seeks, by its *in terrorem* effect, to secure personal jurisdiction where none could be obtained otherwise. Defendants consequently maintain that when tested by the standards of due process enunciated in International Shoe Co. v. Washington,[52] the Delaware procedure must be struck down, at least insofar as it permits the rendition of judgments exceeding the amount of any property lawfully seized.[53]

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50. (Cont'd)

discussion now turns to that distinct question. The dissent, however, would appear to blur the distinction between the questions by suggesting that language employed to answer the first question is actually involved in the answer to the second.

51. *See* Sands v. Lefcourt Realty Corp., 117 A. 2d 365 (Del. 1955); *cf.* Schwartz v. Miner, 36 Del. Ch. 481, 133 A. 2d 599 (1957).

52. 326 U. S. 310 (1945).

53. The federal district court in Delaware has recently addressed itself to this contention. Basing its conclusion on the fundamental proposition that the "foundation of jurisdiction is physical power," Judge Stapleton held that the presence of the property in the state gave the state power over the property and this provided sufficient contact. U. S. Industries v. Gregg, 348 F. Supp. 1004, 1019-21 (D. Del. 1972).

On the record before us, it would appear that the only contact between the defendants and Delaware is the property seized by the sequestrator. Since that is their sole contact, it may be argued that the defendants' exposure to liability should be limited to the degree of their property in Delaware, *i.e.*, limited to the degree of their contact with Delaware. As discussed earlier,[54] however, questions remain as to which of the defendants' properties seized are indeed properly sequesterable. Thus, the specific monetary value of the defendants' contact with Delaware awaits further adjudication. The Trustees seek to recover $4,000,000 from the defendants. Yet, there has not been any determination of the probability of success of the Trustees' claim.[55] Since resolution of these underlying issues—which the dissent characterizes as phantom facts—is necessary before we can say with certainty that the Trustees' judgment will exceed the amount of the property seized, the constitutional issue such an "excess" judgment would present is not yet ripe for determination. Accordingly, we decline to answer it at this time.

We are not unmindful of the awkward position in which the defendants are left by our reluctance to decide whether, consistently with the Constitution, they may be subjected to a liability exceeding the value of the property sequestered. Given that the Delaware procedure does not provide for limited appearances, the defendants are now met with a choice between defaulting on the one hand and, on the other, entering a general appearance to defend the action. Since we

54. *See* text accompanying notes 10-16, *supra*.

55. At the time of a sequestration request, seizures will be ordered if the "complaint, regardless of its merits, is on its face a bona fide allegation." Folk & Moyer, 73 Colum. L. Rev. at 755.

have left the question unanswered, defendants, if they choose to defend generally, and if they are found liable in an amount surpassing the value of their property legitimately seized, will be forced to litigate the constitutionality of the excess award in another appeal.[56] If the constitutional question is decided adversely to them on that appeal, their opportunity to limit their liability by defaulting will, quite obviously, have passed. Conversely, a decision to default now, with the attendant forfeiture of their property, would work to deprive them of the benefit of any subsequent judicial determination that an award in such an action may *not* exceed the value of seized property. Thus, by staying our hand on this point, it may well be that we have deprived the defendants of the opportunity to make a fully informed choice between default and general appearance.

Moreover, it appears that the constitutional question presented by the possibility of a judgment exceeding in amount the value of defendants' property is neither an insubstantial nor a frivolous one. If we assume that defendants will, as a practical matter, decide to defend this action generally, it may be no distortion of language to maintain that they will have been "coerced" into subjecting themselves to the *in personam* jurisdiction of the court.[57] The only justifiable basis of *in personam* jurisdiction is, of course, "power" over the defendants' person.[58] Since the decision in

56. See discussion at p. 31, *infra*.

57. Indeed, at least one court has pointed out that the "avowed purpose of Delaware's sequestration statute is to compel a general appearance and thereby produce a basis for *in personam* jurisdiction." U. S. Industries Inc. v. Gregg, 348 F. Supp. 1004 (D. Del. 1972). *See also* Folk & Moyer, *supra*, at 789.

58. *See* Pennoyer v. Neff, 95 U. S. 714 (1877).

International Shoe Co. v. Washington, 326 U. S. 310 (1945), the exercise by courts of *in personam* jurisdiction over persons without the territorial bounds of the forum has been tested against the so-called "minimum contacts" standards.[59] Where a person elects to do business in a state, be it merely through the appointment there of agents or salesmen, it is not conceptually difficult to conclude that that person, having voluntarily accepted the benefits conferred by the state upon those doing business, may be forced to accept the burdens implicit in subjection to personal jurisdiction. "Minimum contacts" voluntarily established, therefore, offer an acceptable predicate for *in personam* jurisdiction: a personal judgment rendered under such conditions "does not offend 'traditional notions of fair play and justice.' "[60] In this connection, the Supreme Court in Hanson v. Denckla stated:

> "[I]t is essential in each case that there be some act by which the defendant *purposefully* avail itself of the privilege of conducting activities within

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59. 326 U. S. at 316.

60. *Id.* Both the Court of Appeals of New York and the U. S. Court of Appeals for the Second Circuit have upheld the constitutionality of New York's practice of allowing a plaintiff in an accident case to attach a contingent debt owed to the defendant by a New York insurer, although the defendant would not otherwise be subject to suit in New York. *See* Simpson v. Loehman, 21 N. Y. 2d 305, 287 N. Y. S. 2d 633, 234 N. E. 2d 669 (1967), *reargument denied*, 21 N. Y. 2d 990, 290 N. Y. S. 2d 914, 238 N. E. 2d 319 (1968); Minichiello v. Rosenberg, 410 F. 2d 106 (2d Cir. 1968) (en banc), *cert. denied*, 396 U. S. 844 (1969). Significantly, the Court of Appeals of New York has held that recovery in an action brought pursuant to this procedure must be limited to the amount of the debt seized, i.e., to the amount of the insurer's liability. *See Simpson, supra.*

This Court, in an admiralty context, has expressly declined to adopt the New York practice. *See* Robinson v. Shearer & Sons, Inc., 429 F. 2d 83 (3d Cir. 1970).

the forum state, thus invoking the benefits and protections of its laws."[61]

In a case such as this, it might persuasively be argued that since the "voluntariness" of defendants' contacts with the forum state is, at best, attentuated, a personal judgment exceeding the value of their property—seizure of which is the only real jurisdictional base—would offend against due process. However, there appears to be substantial authority to the effect that a "coerced" general appearance will not be deemed involuntary at all, since by opting to appear generally the defendant has in fact "consented" to the court's jurisdiction. In Ownbey v. Morgan, *supra,* the Court spoke with apparent approbation of this "conversion of a proceeding *quasi in rem* into an action *in personam.* . . ."[62] If consent to personal jurisdiction is the necessary implication of the entry of a general appearance, then application here of the "minimum contacts" tests seems misguided, and the *in terrorem* effect of the sequestration procedure might well pass constitutional muster. Ultimate resolution of this issue would depend, then, on which course of analysis a court were to pursue—the "voluntary contact" test of *International Shoe* and *Hanson* or the "implied consent" view of *Ownbey.*[63]

Having illustrated that seemingly divergent lines of Supreme Court and lower court decisions leave the

61. 357 U. S. 235, 253 (1958). (Emphasis added)

62. 256 U. S. at 111. *Cf.* Pennoyer v. Neff, *supra,* 95 U. S. at 730-31, where the court contrasted *in personam* judgments against absent defendants with those in which the party "voluntary appeared." *See* Anderson v. Benson, 117 F. Supp. 765, 769-70 (D. Neb. 1953), and compare Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 F. 214, 218-19 (6th Cir. 1922).

63. *See generally* Folk & Moyer, *supra,* at 789-95.

defendants virtually in the dark as to the constitutionally permissible extent of their liability, we reiterate, with some disquietude, that we cannot at this time lay their uncertainty to rest. This Court has long honored the proposition that we are bereft of power to render "an opinion advising what the law would be upon a hypothetical state of facts."[64] The interdiction against advisory opinions emanates from the very fountainhead of our jurisdiction, Article III of the Constitution. Like other doctrines falling under the general head of "justiciability," it serves to assure that federal courts stay their mandate until confronted with "a question . . . precisely framed and necessary for decision. . . ."[65]

The constitutional question here under discussion, albeit one of vital interest to the defendants, is not, at this juncture, "precisely framed and necessary for decision." The amount of the defendants' property legally seizable remains undetermined; the precise value of any property legitimately seized is, perforce, unknown; the extent of their potential liability is yet to be resolved.[66] There thus survives the real possibility that our resolution of the constitutional issue would indeed prove "advisory," if defendants' liability

64. Aetna Life Ins. Co. v. Haworth, 300 U. S. 299, 241 (1937); *accord* North Carolina v. Rice, 404 U. S. 244, 246 (1971). *See* Conover v. Montemuro, No. 71-1871 (3d Cir. Filed Dec. 20, 1972) slip op. at 18 (Adams, J., concurring) aff'd en banc (3d Cir. Filed May 8, 1973); Super Tire Engineering Co. v. McCorkle, 469 F. 2d 914 (3d Cir. 1972).

65. United States v. Fruehauf, 365 U. S. 146, 157 (1961). *See* South Carolina v. Katzenbach, 383 U. S. 301, 335 (1966); Muskrat v. United States, 219 U. S. 346 (1911); C. Wright, Federal Courts 334 (1963).

66. Even if the amount of lawfully seizable property and the value thereof were known, the question whether the district court's judgment will exceed that value would, obviously, remain unanswered.

happens to be less than the value of the seized property. As much as our appreciation of the hardship visited upon the defendants may move us to reach the constitutional question, the counsel of recognized limitations upon our jurisdiction is more compelling. Accordingly, we hold that resolution of the question would be premature.

One further consideration convinces us of the wisdom of declining to settle this due process issue now. As indicated above,[67] the Supreme Court of Delaware has held that the Delaware sequestration procedure does not permit a limited appearance to defend on the merits.[68] However, the Delaware court has apparently never given its full attention to the constitutional argument that may be mounted against the sequestration statute, insofar as that statute is construed to permit a judgment exceeding the value of property seized.[69] It is not inconceivable that prior to determination by the court below of the extent of defendants' liability, the Supreme Court of Delaware, moved by its perception of this specific constitutional issue, will re-interpret the sequestration statute to prohibit judgments in excess of property seized. Such an interpretation, authoritative and binding upon the federal judiciary, would, of course, obviate any need for this Court to gauge the Delaware statute against constitutional standards.

We think, too, that where the courts of a state have, over the years, repeatedly upheld a statute such as the

67. *See* text accompanying note 48, *supra*.

68. *See* Sands v. Lefcourt Realty Corp., *supra*, 117 A. 2d at 368.

69. *See generally* Folk & Moyer, *supra*, at 789-95. *Compare* the analysis in U. S. Industries v. Gregg, *supra*, 348 F. Supp. at 1019-21, where Judge Stapleton apparently found no constitutional violation worked by the statute's avowed purpose of "coercing" general appearances.

Delaware sequestration law, notions of comity militate in favor of allowing those courts the first opportunity to test the statute against new inroads of constitutional attack. The courts of Delaware have only recently reaffirmed their readiness, in a proper case, to subject the sequestration law to thoroughgoing constitutional analysis.[70]

This is not to say that we would defer decision of the constitutional question were it properly before us, merely to allow the Delaware court the first opportunity to pass on the constitutional validity of the statute.[71] But where, as here, the constitutional issue is not yet ripe for decision in a federal court, a salutary effect upon state-federal relations may be had by holding in abeyance our power to strike down the state statute under attack.[72]

Having set forth our reasons for refusing to settle the constitutional issue at this time, we are not disposed to conclude that we are powerless to meliorate defendants' plight. While Rule 4(e) of the Federal Rules of Civil Procedure permits commencement of this action by the "borrowing" of Delaware's *quasi in rem* procedure, nothing in the Rule appears to require that we "borrow," as well, *all* the accoutrements of Delaware's practice. Thus in the interest of fairness, the defendants, even if they elect to enter a general appearance and defend on the merits, shall not be deemed to have waived their constitutional claim. Accordingly,

70. *See* Gordon v. Michel, 297 A. 2d 420 (Del. Ch. 1972).

71. *Compare* Railroad Comm. of Texas v. Pullman, 312 U. S. 496 (1941).

72. Were the highest court of Delaware to be of the opinion that "excess" judgments are, indeed, invalid, it would appear to have statutory authority to "sever" from the sequestration statute those words thought to permit the rendition of the excess award. *See* 1 Del. C. § 308; Conrad v. State, 41 Del. 107, 16 A. 2d 121 (1940).

if a judgment by the district court exceeds the value of defendants' lawfully seized property, such would be open to constitutional attack either in the district court or on appeal.

We hold, therefore, that the presence of property in Delaware and the involvement of the Penn Central with Delaware provide sufficient basis for the assumption of jurisdiction by Delaware. Thus, we reject, within the context of this appeal, the claims of the defendants that employment of the sequestration statute deprives them of due process.

The defendants further contend that the seizures made by the sequestrator [73] violate the Fourth Amendment since they were not made pursuant to a warrant based on probable cause. An examination of early cases indicates quite clearly that the protection of the Fourth Amendment was not considered to extend to seizures of a civil nature. In *Boyd v. United States,*[74] the Supreme Court stated in dicta:

> "The entry upon the premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth or Fifth Amendment." [75]

While it is clear that the concept of what constitutes a search or seizure impermissible under the Fourth Amendment has evolved significantly since the late nineteenth century, the path of that evolution has

73. The sequestrator is an officer of the court empowered to serve writs, similar to a sheriff or constable. E. Folk, *supra* note 1 at 581.

74. 116 U. S. 616 (1886).

75. *Id.* at 624.

been neither so straight nor so inexorable[76] that it encompasses sequestration proceedings, at least at this time.[77]

Moreover, in *Lebowitz,* the same Fourth Amendment claim was raised, and this Court dismissed the contention summarily.[78]

Bound by the holding of this Court in *Lebowitz* and guided by the unrepudiated pronouncement of the Supreme Court in *Boyd,* we reject the defendants' Fourth Amendment claim.

IV.

The constitutional challenge mounted by the defendants on this appeal has impelled this Court to examine carefully a statute of the State of Delaware. Our examination has, however, been confined to the statute's impact on the litigants present here, in the factual setting of this case. Save for litigation involving the right of free speech,[79] inquiry into a statute beyond that required for deciding the immediate dispute is not only doctrinally impermissible but indicative of a misapprehension of the role of a court in our society. Invalidating legislation is serious business, and should not be indulged in lightly, if there is any basis for substantiating it.

Recognition that the task of the judiciary is deciding cases, and that cases are comprised of discrete,

76. *Compare* Camara v. Municipal Court, 387 U. S. 523 (1967) *with* Wyman v. James, 400 U. S. 309 (1971).

77. *See generally* Comment, *Laprease and Fuentes: Replevin Reconsidered,* 71 Colum. L. Rev. 886, 898-901 (1971).

78. 456 F. 2d at 980.

79. *See e.g.* Thornhill v. Alabama, 310 U. S. 88 (1940). "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Id.* at 97.

at times even unique facts, is necessary to a proper appreciation of the place of the court in our federal system. We are not empowered to be knights-errant, striking down any statute that appears to us to be unattractive. Rather, we may invalidate a statute only when its actual effect on a litigant before the court is to deprive that litigant of a right secured by a superior law, here the United States Constitution.[80]

Moreover, this Court is neither equipped nor empowered to act as a finder of fact. Appellate adjudication involves reviewing the application of law to facts found by the district courts, even though at times it may be enticing to forego this necessary albeit time-consuming step. On occasion, in a zeal to decide all issues presented, some have asserted that a particular issue involves only the application of law, thus obviating the need for facts found by a district court. Although this approach, having the advantage of celerity, is to some inviting, sound judicial procedure requires that it be eschewed in favor of a more orderly resolution of a particular case.

For all the reasons set forth above, the judgment of the district court will be reversed and the case remanded for action consistent with this opinion.

GIBBONS, *Circuit Judge,* dissenting

I concur in that part of Judge Adams' opinion affirming the vacation of a default entered against the defendants. I dissent from the reversal of the district court's order because of my disagreement with the

80. "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land." U. S. Const. Art. VI, § 2.

majority over the proper interpretation of the Delaware Sequestration Statute, over the treatment of the defendants' due process contentions, and over postponement of the resolution of issues properly before us. Since the district court's interpretation of the Delaware Sequestration Statute provides an adequate nonconstitutional basis for decision, I would affirm on that ground, and will commence analysis of the case at that point.

A. Application of the Delaware Sequestration Law

This diversity action (that is the only federal jurisdiction alleged) was brought by the Trustees of Penn Central Transportation Company against Fidel Gotz, a West German national, Volker Gotz, a Swiss national and seven business entities organized in Switzerland or Liechtenstein. The complaint charges that Fidel Gotz controls the seven business entities, and that acting through them in Europe he fraudulently misappropriated four million dollars belonging to the estate being administered by the plaintiffs. None of the defendants are residents of Delaware or qualified to do business there. The transactions giving rise to the alleged misappropriation did not take place in Delaware. The only process which has issued from the district court is a sequestration order issued pursuant to the borrowing provision of Fed. R. Civ. P. 4(e)(2). Prior to 1963, an action could not have been commenced in a United States District Court in this manner. *Big Vein Coal Co. v. Read,* 229 U. S. 31 (1913); *Davis v. Ensign-Bickford Co.,* 139 F. 2d 624 (8th Cir. 1944). The 1963 amendment to Rule 4(e) made it possible to bring an original quasi in rem action in the federal court. But the district court in

a diversity case can go no further in compelling a defendant's appearance by the quasi in rem device than could the state court whose jurisdictional device it borrows.

The sequestration by which this action commenced was issued on the basis of a conclusively framed affidavit alleging, on information and belief without specifying the source of the belief in any detail, that one or more of the nine defendants had a legal or an equitable interest in one or more of thirteen different categories of property. The sequestrator's return indicated that three of the defendants, Inter-Marketing Corp. Anstalt, Minolta Anstalt, and Vileda Anstalt, had an interest in property in three of the sixteen concerns in Delaware to whom notice of the sequestration had been addressed. As to six of the nine defendants, the sequestrator reported no property subject to sequestration. By an order dated September 14, 1971, the district court vacated the sequestration as to these six defendants and no appeal has been taken from that order. On December 20, 1971, the district court quashed the sequestration as to Inter-Marketing, Minolta and Vileda on the ground that the affidavit supporting it was insufficient under the applicable Delaware statute and rules. *See* 336 F. Supp. 197 (D. Del. 1971). The property in issue, as disclosed in the return of the sequestrator, is as follows:

(1) Sequestered at SSI Computer Corp. (now ITEL Computer Leasing Corp.)

(a) 50 shares of SSI common stock owned by Inter-Marketing

(b) 30,000 warrants to purchase SSI common stock, owned by Inter-Marketing

(c) 10,000 warrants to purchase ITEL stock, owned by Vileda

(d) a $1,000,000 principal amount 7% note of SSI Computer Corp. held by Inter-Marketing

(e) $500,000 principal amount of SSI registered debentures. These debentures had been sold by Vileda on December 22, 1970 by physical delivery and by payment, but on the date of sequestration, March 17, 1971, had not yet been registered in the name of the purchaser because the transfer agent had requested additional signature guarantees. When the sequestration took place the buyer was still in the process of complying with this request.

(2) Sequestered at Textron Atlantic, Inc.

(a) 25,360,500 (Swiss francs) principal amount 8% notes of Textron, held by Minolta.

For reasons which will appear hereinafter, somewhat different legal issues are presented by the attempted sequestration of common stock, of warrants to purchase common stock, of negotiable notes and of registered debentures. Moreover, there is a significant distinction between the debentures sold on December 22, 1970, and the balance of the property. None of the indicia of ownership of these various interests was physically seized in Delaware.

The sequestration statute, 10 Del. C. § 366(a), permits the Court of Chancery to make an order compelling a nonresident defendant to appear. The court may

compel such appearance ". . . by the seizure of all or any part of his property." The defendant can obtain release of the property only by entering a general appearance. The statute provides that any transfer or assignment of the seized property shall be void. 10 Del. C. § 366(c).

The operation of such foreign attachment statutes (or as here their equitable counterpart) is not notoriously fair. Commenting on the proposed amendment to Rule 4(e) which ultimately made their use available in original proceedings in the federal courts, Professor Carrington noted the anomaly that state courts could use quasi in rem procedures while federal district courts could not, but observed:

> "The anomaly, however, is an anomalous exception to an anachronistic rule. In the light of the emerging concept of personal jurisdiction, the quasi in rem procedure is rarely useful to plaintiffs except in cases which the defendant ought not to be asked to defend in the forum chosen by the plaintiff." Carrington, *The Modern Utility of Quasi In Rem Jurisdiction,* 76 Harv. L. Rev. 303, 306 (1962).

The anachronism of the quasi in rem devise for compelling an appearance in a jurisdiction in which a defendant ought not to be asked to defend is compounded when coupled with procedures which would permit wholesale fishing expeditions among dozens of possible debtors in order to discover some property which may be used as an appropriate bludgeon with which to exercise that compulsion. To insure against such a potential abuse of the Delaware statute, and hence of the jurisdiction of the Delaware courts, that state adopted Delaware Chancery Rule 4(db). A key

concern was that prior to the seizure the plaintiff should with reasonable certainty specify that which was to be seized. In *Cantor v. Sachs,* 18 Del. Ch. 359, 390-91, 162 A. 73, 85 (1932), Chancellor Wolcott expressed the concern thus:

> "In the instant case the defendants happen to be in the business of buying and selling and underwriting stocks and bonds. In a sense they are merchants and their merchandise consists of securities. By securing a sequestrator to roam around and seize all the stock of Delaware corporations owned by the defendants or standing in their names, amounting as I have before stated to about 368,339 shares, the complainants have practically taken from the possession of the defendants a considerable portion of their merchandise and turned it over to the equivalent of a receiver pendente lite, before a single item of liability is established against them, on an ex parte application. Now that sort of thing is rather drastic. Such drag net enterprises are not to be encouraged. I expressly disclaim any purpose to characterize the present complainants or their solicitors, when I say that it is common knowledge that frequently the processes of courts are utilized by a certain class of litigants appropriately described by the expressive word 'snipers.' If such litigants are permitted to inaugurate suits against defendants who are reputed to be large holders of stock, and secure from the court an official 'fisherman' to go forth in their behalf and drag a sein through the corporate waters in the blind search for the property of defendants in the hope that vexatious seizures might result, scandalous abuses could be perpetrated. There

should of course be no obstacle thrown in the way of honest suitors who file their bills in the best of faith. How to obviate the possible abuses and at the same time preserve the rights of litigants who are actuated by a bona fides of purpose, is a difficult problem.

* * *

Furthermore, some safeguard should be provided against what for want of a better term I may call fishing expeditions. It seems to me that complainants who seek to bring their adversaries into court by seizure of their property ought to be prepared to say with reasonable certainty what property they desire to have seized. It is hardly comportable with the dignity of the court to appoint a judicial agent to go forth on a hunt in behalf of a complainant and beat the bushes for him."

Rule 4(db) is the result of the Chancellor's concern that the court not be used as an agent to go forth on a hunt in behalf of a complainant and beat the bushes for him so that he can bludgeon an appearance in Delaware. It requires that the affidavit contain:

"(1)(b) The following information as to the property of each such defendant sought to be seized:

(1) A reasonable description thereof.

(2) The estimated amount and value thereof.

(3) The nature of the defendant's title or interest therein; and if such title or interest be equitable in nature, the name of the holder of the legal title.

(4) The source of affiant's information as to any of the items as to which the affidavit is made on information and belief.

(5) The reason for the omission of any of the required statements."

Nowhere in the affidavit on which the sequestration order was based is it stated that Inter-Marketing, Minolta, or Vileda owned any of the property which has been sequestered. Indeed the affiant expressly negates knowledge of such ownership, averring:

"8. Affiant is unaware of and, therefore, unable to state that any person or persons or other legal entities have an equitable or legal interest in any of said property because such information is peculiarly within the knowledge of the defendant Fidel Gotz or persons or corporations subject to his control and domination and not available to plaintiffs or affiant."

It must be apparent to anyone that if the quoted averment is sufficient to avoid the application of Rule 4(db)(1)(b) then that rule, as a means of satisfying the concern about fishing expeditions expressed by the Chancellor in *Cantor v. Sachs, supra,* is meaningless. The quoted averment is one that could be made by anyone in the world with respect to anyone reputed to be a large holder of corporate securities. As the district court put it:

"If Taylor's affidavit is sufficient to support the present seizure, so also would be an affidavit stating that one or more of fifty defendants *might* own specified stock or bonds in one or more of one hundred companies." 336 F. Supp. at 202.

The majority opinion answers this contention by saying:

> "The danger of a 'fishing expedition' is not present when, as in this case, the affiant endeavors to attain the maximum possible degree of specificity, and additional precision is beyond the affiant's facilities, because of the complex inter-corporate activities of multiple inter-related defendants."

This amounts to saying that the less specific is the plaintiff's information the greater is the justification for turning the court's sequestrator into "a judicial agent to go forth on a hunt in behalf of a complainant and beat the bushes for him." *Cantor v. Sachs,* 18 Del. Ch. at 391, 162 A. at 85. Such a construction of the Delaware rule is a complete emasculation of its intended purpose.

Reinforcing its specious refutation of the district court's analysis, the majority opinion continues:

> "Along much the same line, the affiant has asserted that the corporations holding the legal title of the shares are but the alter egos of the principal defendant. Thus, for the purpose of protecting against dragnet seizures, there may be considered to be one defendant with many facets. On these bases, the fears of the district court would not appear to be well-founded in this case."

The less the plaintiff can tell the court about who holds what the principal defendant actually owns, in other words, the greater is the justification for sending the court's judicial agent forth to beat the corporate bushes for the plaintiff. This was not what Chancellor Wolcott had in mind.

The majority also finds solace in *Rebstock v. Lutz,* 39 Del. Ch. 25, 158 A. 2d 487 (1960). There is no similarity between this case and *Rebstock.* The defect in the affidavit with which *Rebstock* deals is a failure to state the estimated *amount and value* of the property as required by Rule 4(db)(1)(b)(2). The court held that the omission was explained sufficiently for purposes of subpart (5) of paragraph 1(b). As to *ownership,* the *Rebstock* affidavit stated:

> "Upon information and belief the property of said defendants consists of shares of stock in Slayton Associates, Inc., and Managed Funds, Incorporated, and Christiana Oil Corporation." 39 Del. Ch. at 30, 158 A. 2d at 490.

It did not say, as does the affidavit in this case, that the affiant was unaware of the owners of the property. *Rebstock* quite clearly supports the interpretation of the Delaware rule made my the experienced Delaware district judge in this case, and, indeed, was relied on in his opinion. 336 F. Supp. at 202. That opinion, as does the *Rebstock* opinion, draws a distinction between the specific information in the affidavit which may be omitted pursuant to subparagraph (1)(b)(5) of Rule 4(db) and the general power of the court, in its discretion, to dispense with or modify any part of the sequestration rule. Rule 4(db)(5). *Rebstock* only involved the facial sufficiency for purposes of subparagraph (1)(b)(5) of the affidavit respecting an omission of amount and value. It did not, as the majority opinion suggests, involve an application to the court for discretionary relief pursuant to Rule 4(db)(5). No such application was made in this case. As the district court put it:

> "The need for a plaintiff to specify the property of each defendant sought to be seized is so basic that if it is excusable at all it can only be by judicial action taken under 4(db)(5). Plaintiffs have never applied for or obtained such approval." 336 F. Supp. at 203.

The Delaware requirement that the Delaware court exercise an informed discretion before it will permit its sequestrator to act as "a judicial agent to go forth on a hunt in behalf of a complainant and beat the bushes for him" is a reflection of the court's appreciation that there are due process limitations upon its power to use the quasi in rem device to dragoon a defendant into a general appearance in Delaware. Those due process limitations will be referred to in a later part of this opinion. Since Judge Steel's interpretation of the Delaware sequestration rule, with which he is obviously far more familiar than any member of this panel, is entirely consistent with its text, with the purpose announced by Chancellor Wolcott in *Cantor v. Sachs, supra,* and with every Delaware authority interpreting it, I would affirm on the same ground on which he decided.

But the appellees have advanced additional reasons for affirmance, some of which present nonconstitutional issues dealt with by the majority largely by avoiding the responsibility of decision. Each is substantial and each suggests an affirmance in whole or in part on nonconstitutional grounds.

(1) The $500,000 principal amount of SSI debentures were sold by Vileda on December 22, 1970 by physical delivery and payment. These were registered debentures so that arguably Vileda still had bare

legal title on March 19, 1971, the date of the sequestration. But the Delaware law is clear that absent special circumstances property in which the defendant has only a legal interest should not be subject to sequestration. *See Jacobs v. Tenney,* 316 F. Supp. 151, 162 (D. Del. 1970); *Nickson v. Filtrol,* 265 A. 2d 425 (Del. Ch. 1970); *Steinberg v. Shields,* 38 Del. Ch. 423, 153 A. 2d 599 (1959). The order quashing the sequestration as to these debentures clearly should be affirmed. This issue the majority opinion treats in a footnote, referring it back to the district court. But the fact of sale is not in dispute. Either the cited authorities apply, or they do not. If the majority do not contest their application, why should this ground for affirmance be referred back to the district court?

(2) Of the securities sequestered, there are only 50 shares of SSI common stock. The balance of the securities consisted of notes, debentures and warrants to purchase stock. Under the Uniform Commercial Code these notes, debentures, and stock warrants, as well as the common stock, are investment securities. 5 A. Del. C. § 8-102(a). Under that Code investment securities are negotiable instruments having their situs where the instrument is held. 5 A. Del. C. § 8-105(1). When Delaware adopted the Uniform Commercial Code, however, a savings clause, 5 A. Del. C. § 8-317(1), was included to the effect that the Code would not be construed to amend or repeal certain other statutes, including 8 Del. C. § 169, which provides:

> "For purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State . . . the situs of the ownership of the capital stock of all corporations existing under the laws

> of this State . . . shall be regarded as in this State."

That statute applies by its terms only to the 50 shares of SSI stock. It is not in point with respect to the remaining investment securities. Two Delaware cases have held that securities representing indebtedness of a Delaware corporation have their situs in Delaware. *See Landau v. Best*, 41 Del. Ch. 1, 187 A. 2d 75 (1962); *Weinress v. Bland*, 31 Del. Ch. 269, 71 A. 2d 59 (1950); *accord, Jacobs v. Tenney, supra.* But in *Landau*, the Supreme Court of Delaware, citing *Bank of Jasper v. First National Bank*, 258 U. S. 112 (1922), acknowledged that if the debentures in issue were negotiable they would have no situs in Delaware. 41 Del. Ch. at 2-3, 187 A. 2d at 76. The court looked to New York law, since the indentures pursuant to which the debentures were issued stated that New York law should apply. The *Landau* finding of nonnegotiability was based on the then-existing New York law. Under N. Y. U. C. C. § 8-105(1) (McKinney 1964) the result would of course be different. In the instant case, the notes, debentures and warrants, provide that New York or California law should apply. California, too, has adopted U. C. C. § 8-105(1) (West Supp. 1973). Thus, under the *Landau* analysis none of the sequestered securities except the 50 shares of SSI common stock, to which 8 Del. C. § 169 applies, had a situs in Delaware, and none was subject to the quasi in rem jurisdiction of a Delaware court. As to all these negotiable investment securities, the order quashing the sequestration should be affirmed.

This issue, the majority opinion suggests, "may involve a question of fact," and on this basis holds that

the issue is not ripe for adjudication. What issue of fact? What additional facts will serve to illuminate whether the law of New York or of California would treat the securities as negotiable investment securities under the Uniform Commercial Code? What additional facts will serve to guide the district court as to the appropriate choice of law on the issue of negotiability? The "question of fact" is a phantom, conjured up as an excuse for postponing decision on a legal issue clearly ripe for adjudication. Meanwhile, the issuers of the negotiable investment securities remain subject to an order of sequestration.

Contrast the majority's willingness to reverse the interpretation by an experienced Delaware district court judge of a Delaware statute and rule, with both of which he is obviously far more familiar, with its unwillingness to decide an issue of choice of law and an issue of negotiability under a uniform law of investment securities. These questions are referred back to the same district judge, although, as to them, this court obviously is as well qualified to decide as is he, and although they are clearly ripe for adjudication. Of course this irresolution has the added feature of leaving in the hands of the plaintiffs whatever leverage they obtain from continuing the sequestration order in effect in the interim. I most strongly disassociate myself from such a result.

B. The Constitutionality of the Delaware Sequestration Law as applied.

Appellees contend that under the circumstances of this case Delaware could not constitutionally exercise quasi in rem jurisdiction to force them to make a general appearance in the courts of that state because

Delaware lacks minimum contacts with either the subject matter or the parties. Their contention is strengthened, of course, because the bulk of the sequestered securities are debt obligations of corporate debtors. If the determining factor for the exercise of quasi in rem jurisdiction over a debt is the presence of the debtor within the jurisdiction of the court, such presence is not dependent upon the debtor's place of incorporation. It would exist in any state in which a corporate debtor had qualified to do business or was otherwise present. *See Harris v. Balk,* 198 U. S. 215 (1905). As pointed out above, such a result is now precluded by § 8-105(1) of the Uniform Commercial Code. The majority declines to rule on that issue, however. That Delaware is the state of incorporation of the debtor is an irrelevancy, for many corporate debtors incorporated elsewhere are present there, and many incorporated there are present in all fifty states of the Union. The issue is whether a foreign national, with respect to a foreign transaction, can be compelled to litigate in any one of the fifty states [1] in which a corporate debtor happened to be present whose negotiable debt securities, or other oligations, the defendant happened to own.

Traditionally, the approach of confining jurisdiction, for due process purposes, to those jurisdictions having certain minimum contacts, has been followed in cases involving in personam jurisdiction. *E.g., International Shoe Co. v. Washington,* 326 U. S. 310 (1945); *U. S. Industries, Inc. v. Gregg,* 348 F. Supp. 1004 (D. Del. 1972). But where, as here, no party is a resident of the state, and the cause of action did not arise in the state, and the claim, except for potential satisfaction of

1. There would be venue in this diversity case in all judicial districts. 28 U. S. C. § 1391(d).

a judgment, involves no property within the state, a court must, I submit, make the same interest analysis before asserting jurisdiction quasi in rem as it would before it asserted jurisdiction in personam. The better reasoned authorities which have considered the matter have made such an analysis.

In *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P. 2d 960 (1957), *cert. denied*, 357 U. S. 569 (1958), for example, Judge Traynor stated that since a person might be forced personally to appear (the very purpose of the procedure) when a state asserted quasi in rem jurisdiction, a minimum contacts analysis should be made to determine whether forcing such an appearance was consistent with due process.

A quite significant group of cases presenting a closely analogous issue arose as a result of the attachment procedure sanctioned by the New York Court of Appeals in *Seider v. Roth*, 17 N. Y. 2d 111, 216 N. E. 2d 312, 269 N. Y. S. 2d 99 (1966). In that case the plaintiff, a New York resident, was involved in an automobile accident in Vermont with a resident of Canada. The court held that quasi in rem jurisdiction in New York was obtained when the plaintiff attached an automobile insurance liability policy issued in Canada by an insurance company which was doing business, and hence minimally present, in New York. The court reasoned that the obligation of the insurer to defend and indemnify was a debt which could be attached wherever the debtor could be found. It reconsidered the problem in the light of a constitutional objection in *Simpson v. Loehmann*, 21 N. Y. 2d 305, 310-11, 234 N. E. 2d 669, 671, 287 N. Y. S. 2d 633, 636-37 (1967), *reargument denied*, 21 N. Y. 2d 990, 238 N. E. 2d 319, 290 N. Y. S. 2d 914 (1968) (per curiam),

and relying on *Harris v. Balk, supra,* held the procedure to be constitutional. In *Minichiello v. Rosenberg,* 410 F. 2d 106 (2d Cir. 1968), *aff'd on rehearing in banc,* 410 F. 2d 117, *cert. denied,* 396 U. S. 844 (1969), the *Seider v. Roth, supra,* quasi in rem procedure came before the Second Circuit. Judge Friendly noted that the *Seider* decision had judicially created a direct action statute. Analyzing the interests and contacts involved, he concluded that the Supreme Court probably would uphold such a statute enacted for the benefit of New York residents, or for the benefit of nonresidents injured in New York. 410 F. 2d at 110. On rehearing in banc, Judge Friendly dealt directly with the due process issue arising from the exercise of quasi in rem jurisdiction. He found that the exercise of such jurisdiction was justified by *Harris v. Balk, supra.* Three judges dissented, distinguishing *Harris v. Balk,* and urging that there were insufficient New York contacts to sustain jurisdiction. *See* 410 F. 2d at 113-17 (Anderson, J., dissenting from the panel decision), and 410 F. 2d at 120-22 (Anderson, Lumbard and Moore, JJ., dissenting from the in banc decision). The majority opinions in *Minichiello,* however, rest at least in part on the limitation upon *Seider v. Roth, supra,* announced in *Simpson v. Loehmann, supra,* 21 N. Y. 2d 990, 238 N. E. 2d 319, 290 N. Y. S. 2d 914 (1968) (denying reargument) (per curiam), which held that even if the defendant appeared and defended on the merits a judgment could be rendered only up to the amount of the policy. This result was later codified. *See* N. Y. C. P. L. R. 320(c), which allows a limited appearance in all cases of quasi in rem jurisdiction. The Second Circuit noted that this meant that a *Seider* judgment could not be given collateral

estopped effect in a later suit. 410 F. 2d at 112. Thus, the *Minichiello* holding recognized that the *Seider* jurisdiction could not be resorted to in order to compel a general appearance, and that it was available only for New York resident plaintiffs or for New York accidents. These limitations were confirmed in *Farrell v. Piedmont Aviation, Inc.*, 411 F. 2d 812, 816-17 (2d Cir.), *cert. denied*, 396 U. S. 840 (1969). Judge Friendly noted that without these limitations the *Seider* procedure would be of doubtful constitutionality and that "[t]he constitutional doubt arises from New York's lack of meaningful contact with the claim . . . ." 411 F. 2d at 817. *Cf. United States v. First National City Bank*, 379 U. S. 378, 381 (1965), in which the Court, sustaining exercise of quasi in rem jurisdiction, noted that the result might have been different if the defendant whose account in Citibank had been attached had not also been subject to in personam jurisdiction under the New York long arm statute. Quite clearly the Second Circuit in *Farrell* rejected the view that the presence of a debtor within the jurisdiction is sufficient without other minimum contacts, to sustain a compelled general appearance by use of a quasi in rem attachment.

Applying a minimum contacts tests in this case compels the conclusion that the exercise of quasi in rem jurisdiction would violate due process. There is no possibility, under the Delaware statute and rule, of a special appearance.[2] None of the parties are

2. The majority does not resolve the question whether the federal district court, under the 1963 amendment to Rule 4(e), must accept the Delaware quasi in rem procedure as it stands, or may on its own permit a special appearance. *Compare* Dry Clime Lamp Corp. v. Edwards, 389 F. 2d 590 (5th Cir. 1968), *with* United States v. Balanovski, 236 F. 2d 298 (2d Cir. 1956), *cert. denied*, 352 U. S. 968 (1957).

Delaware residents. The cause of action did not arise in Delaware. The interest of Delaware is no greater than that of any jurisdiction in which a debtor may be found whose investment securities or other debts one of the defendants happen to hold. *See Lebowitz v. Forbes Leasing and Finance Corp.*, 456 F. 2d 979 (3d Cir.), *cert. denied*, 409 U. S. 843 (1972), in which this court's analysis of the Pennsylvania foreign attachment statute focused on the Pennsylvania governmental interests involved. *See also* Note, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 Yale L. J. 1023, 1025-26 (1973).

The majority opinion finds two due process justifications for the exercise of quasi in rem jurisdiction in Delaware.

The first ground is that the defendants are not amenable to in personam service in Delaware or any other state of the union.[3] The opinion even relies upon Delaware's rather limited long-arm statute. 10 Del. C. § 3104, 8 Del. C. § 343. One defect in this reasoning is that it relies upon the very absence of minimum contacts as a ground for ignoring the due process requirement that before jurisdiction is asserted there be such contacts. The less justification there is for asserting personal jurisdiction, in other words, the greater is the justification for attaching property which may be used to bludgeon a general appearance. Such reasoning involves, it seems to me, an inversion of the due

3. The majority notes:

"Were the defendants here amenable to service pursuant to a Delaware statute, or even if the defendants were not liable to suit in Delaware but were liable in another state of the Union, we would be presented with not inconsiderable difficulty in holding that these asserted state interests outweigh the right of the property owners to notice and a hearing prior to being deprived, even temporarily, of their property." (footnote omitted).

process clause. Another defect in this reasoning is that the unamenability of the defendants to process in the United States has occurred in this case not by reason of anything they have done, but because, so far as the record discloses, they have never been here. Penn Central, the plaintiffs' predecessor in title to the claim being asserted, chose to do business with foreign nationals in a foreign jurisdiction. I cannot see for the life of me why that possible improvidence on the part of the Penn Central can be resorted to by the trustees as a reason for forcing those foreign nationals to make a general appearance in Delaware, a state having no relationship with the transaction involved, or forfeit debts owed from third parties having no relationship with the transaction involved.

The second ground is that the "plaintiffs are trustees of a corporation that is incorporated in Delaware, has substantial property in Delaware and conducts a significant amount of business in Delaware." Penn Central Transportation Company is a corporation which was organized under the laws of Delaware, but its principal office, according to the complaint, is in Philadelphia. For purposes of diversity jurisdiction, in a railroad reorganization, the citizenship of the bankrupt is determinative. 11 U. S. C. §§ 205(*l*), 46(b). Congress could have given subject matter jurisdiction in this type of case to all federal district courts. *See Williams v. Austrian*, 331 U. S. 642 (1947), for the broader jurisdiction available to a Chapter X trustee. Instead, under sections 23 and 77(*l*) of the Bankruptcy Act it has limited federal jurisdiction to those courts in which the debtor could have sued. Moreover, it could have made process in such cases extraterritorial. Had that been done, our analysis would have been concerned with whether such an exercise of jurisdiction and proc-

ess is consistent with the law of nations. However, since Congress has not done this, jurisdiction in this case is grounded solely on diversity of citizenship. Thus, we are confronted with the question whether Penn Central could, by virtue of its incorporation, ownership of property and business conducted in Delaware, have compelled a foreign national, with whom it did business elsewhere, to subject itself to jurisdiction in that State's courts. Obviously Delaware has no interest peculiar to it.[4] If Delaware can assert jurisdiction on such grounds, so can any other of the numerous states in which Penn Central was qualified to do business, owned property and did business. If Delaware can assert jurisdiction on this basis, undoubtedly the courts of every state in the Union would be open to corporations such as General Motors Corporation, which do business, and own property, almost everywhere. The cases following *International Shoe Co. v. Washington, supra,* preclude this result for purposes of in personam jurisdiction. All that is added here is the happenstance of locating a garnishee in Delaware. That is the *sole* real connection of Delaware with this lawsuit, and is not such a connection as, consistent with due process, permits Delaware to compel a general appearance or even a limited appearance in its courts in connection with litigation entirely unrelated to the debt. *But see Standard Oil Co. v. Superior Court,* 44 Del. 538, 62 A. 2d 454 (1948), where the Delaware Supreme Court upheld the foreign attachment statute in an action by a nonresident plaintiff against a nonresident defendant on a foreign cause of action.

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4. Incorporation in Delaware is particularly insignificant for a railroad, since it is to some extent the creature of the legislative franchise of every state through which its lines pass.

While partially rejecting the defendants' due process contentions, the majority opinion apparently leaves open the question whether, by the quasi in rem device, a foreign national can be compelled to submit to an in personam judgment beyond the value of the property seized. Postponement of the resolution of that question is justified by the same phantom fact issues which the majority relies upon to avoid decision as to which of the securities were actually subject to sequestration. Because of the majority's nondetermination as to the securities subject to sequestration both the amount of the property seized and the amount of the plaintiffs' claim are in doubt, and these two doubts, one of which the majority has gone to great pains to create, serve as the excuse for not deciding whether the defendants can be coerced into a general appearance in order to contest the plaintiffs' claim against the seized property. The suggested justification for this course is an unwillingness to decide constitutional issues "prematurely". As the majority opinion candidly concedes, this ruling gives the defendants a Hobson's choice. Neither this court, nor, apparently, the district court, should decide the constitutionality of compelling a general appearance so as to subject defendants to a judgment in excess of the amount of property seized until such time as the amount of the plaintiffs' claim has been liquidated. But, in order to contest the amount of the plaintiffs' claim, the defendants will, if the Delaware statute applies, be required to enter a general appearance. The majority does not even suggest that something short of a general appearance should be permitted if the defendants attempt some sort of reservation of rights. None is permitted under the Delaware statute. Thus, the defendants run the risk that on the second appeal,

after judgment, we will enforce the general appearance in accordance with its terms, or that some other jurisdiction will afford comity to any resulting judgment. To avoid these risks, the defendants must surrender to the plaintiffs the property seized—several million dollars worth—and forget about litigating the plaintiffs' claims.

Let us suppose, however, that the defendants do choose to litigate, that a judgment against them in excess of the property seized does result, and that on appeal, we hold that the issue of the coerced general appearance is still open. What will have occurred to make the due process claim any more "concrete" at that point than it is now? Nothing, I submit. If, on the other hand, the defendants litigate and win, at least to the extent that the plaintiffs' judgment is less than the seized property, this court would have avoided a decision on the legality of the coerced general appearance. But the cost of that avoidance will have been to subject the defendants to the risks referred to above, and to the loss of use of several million dollars of property in the meantime. The practical effect of the course chosen by the majority is to add to the settlement leverage resulting from a massive ex parte seizure the additional leverage resulting from the uncertainties and ambiguities of its ruling. This is not my idea of responsible judicial action, especially when there is an available nonconstitutional ground on which the matter could be decided. We could hold that while Rule 4(e), Fed. R. Civ. P., permits the commencement of a federal diversity action by borrowed quasi in rem process, it does not require the borrowing, as well, of the state law rule prohibiting the contesting of liability in the absence of a general appearance. A holding that

in the federal courts a special appearance is permitted would satisfy even the majority's expressed timidity about applying the due process clauses to a state statute.

Another aspect of the majority opinion puzzles me. This is a diversity case in an article III court. Yet explicitly and implicitly the opinion suggests that foreign residents, because they are such, should receive less consideration of their due process claim that they should not be dragooned into a Delaware lawsuit than would be afforded to residents of the United States. Such an approach, it seems to me, is inconsistent with the only substantial reason for the existence of diversity jurisdiction, namely affording nonresidents a forum in which they will be on equal footing with residents. Instead, the majority says that because the defendants are not amenable to in personam process in Delaware or any other state in the Union, Delaware's interest in subjecting their property to seizure is thereby greater.

There are, as I have said above, several adequate nonconstitutional grounds for affirming the district court. But accepting the majority's misinterpretation of Delaware law, there should still be an affirmance. It is time that *Ownbey v. Morgan,* 265 U. S. 94 (1921), be considered in the light of *International Shoe Co. v. Washington, supra,* and its progeny. There is no reason for considering the jurisdiction recognized in *Ownbey v. Morgan, supra,* as exempt from the stricture of the fifth and fourteenth amendment due process clauses. *Ownbey v. Morgan, supra,* and *International Shoe Co. v. Washington, supra,* cannot be reconciled if the former is not applied subject to a minimum contacts analysis. The treatment of the minimum con-

tacts issue in the majority opinion is the reverse of such an analysis, for it proceeds on the assumption that the less contacts the defendants or the transaction has with Delaware, the greater is that state's interest in asserting jurisdiction quasi in rem. A state may subject a defendant's property to a pre-hearing seizure if there is a compelling state interest justifying that procedure. *Fuentes v. Shevin*, 407 U. S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969); *Lebowitz v. Forbes Leasing & Finance Corp.*, 456 F. 2d 979 (3d Cir.), *cert. denied*, 409 U. S. 843 (1972). But it may not assert judicial power over a dispute with which it has no minimum contacts. *International Shoe v. Washington*, *supra*. The majority opinion assumes that circumstances which would justify a pre-hearing seizure in a quasi in rem proceeding will also justify an extension of the state's judicial power to controversies in which it has no legitimate interest.

I would affirm.

ORDER OF THE COURT OF APPEALS GRANTING THE TRUSTEES' MOTION FOR STAY PENDING APPEAL.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-2150.

GEORGE P. BAKER, ET AL.,
Appellants

v.

FIDEL GOTZ, ET AL.

(D. C. Civil No. 4072)

SEITZ, *Chief Judge*, and VAN DUSEN and ADAMS, *Circuit Judges*.

Upon consideration of appellants' motion for stay pending appeal in the above-entitled case, and memorandum of appellees in opposition thereto, both in the above-entitled case,

It is ORDERED that appellants' motion for stay pending appeal be and hereby is granted, said stay to be effective immediately, provided, however, that said stay shall not continue beyond January 3, 1972, unless bond in the amount of twenty-five thousand dollars

($25,000) is filed in the District Court for the District of Delaware, the surety of said bond to be approved by the Clerk of the said District Court, and provided, also, that said bond may be signed by the surety only; and

It is Further ORDERED that the parties to this appeal abide by the following briefing schedule:

(1) Appellants' legible typewritten brief to be hand filed and hand served not later than January 10, 1972. The appellants are dispensed from the filing of an appendix to the brief, and the appeal is to be heard on the original record.

(2) Appellees' legible typewritten brief to be hand filed and hand served not later than January 24, 1972;

(3) Appellants' legible typewritten reply brief, if any, to be hand filed and hand served not later than January 27, 1972; and

It is Further ORDERED that the Clerk of this Court list this case for disposition on the merits at the earliest convenience of the Court.

By THE COURT,

(Sgd.) FRANCIS L. VAN DUSEN,
Circuit Judge.

Dated: December 23, 1971

THE TRUSTEES' NOTICE OF APPEAL TO THE COURT OF APPEALS.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GEORGE P. BAKER, et al.,
Plaintiffs,

v.

FIDEL GOTZ, et al.,
Defendants.

Civil Action No. 4072

NOTICE OF APPEAL.

NOTICE is hereby given that George P. Baker, Richard C. Bond, Jervis Langdon, Jr., Willard Wirtz, Trustees of the Property of the Penn Central Transportation Company, Plaintiffs in the above action hereby appeal to the United States Court of Appeals for the 3rd Circuit from the order of the U. S. District Court for the District of Delaware dated December 20, 1971, and from all decretal portions thereof including those paragraphs granting the Motion of Defendants to vacate the Order of Sequestration dated March 19, 1971 and to quash the seizure of all property seques-

tered thereunder, and denying plaintiffs motion for stay pending possible appeal.

Of Counsel:

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/s/ WILLIAM E. TAYLOR, JR.
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Wilmington, Delaware
Attorney for:
George P. Baker
Richard C. Bond
Jervis Langdon, Jr.
Willard Wirtz.

THE ORDER OF THE DISTRICT COURT.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GEORGE P. BAKER, et al.,
Plaintiffs,

v.

FIDEL GOTZ, et al.,
Defendants.

Civil Action No. 4072

ORDER

AND NOW, TO WIT, this 20th day of December, 1971, (1) the motion of defendants to vacate the sequestration order of March 19, 1971 and/or dismiss for lack of jurisdiction, and (2) the petition of Textron Atlantic, Inc. and Textron, Inc. for instructions, having come on to be heard,

IT IS ORDERED, for the reasons stated in the opinion filed on this date:

1. The motion of defendants to vacate the order of sequestration dated March 19, 1971 and to quash the seizure of all property purportedly sequestered thereunder, including the 25,360,500 (Swiss francs) principal amount of 8% Notes of Textron Atlantic, Inc., be and the same hereby is granted.

2. The effectiveness of paragraph 1 is stayed for five days from the date hereof solely for the purpose of enabling plaintiffs in the interim to pursue any right to review which they may have and to seek a stay in this Court or in the Court of Appeals.

3. The motion of defendants to dismiss the complaint for lack of jurisdiction is denied. Plaintiffs will have until February 15, 1972 within which effectively to serve the defendants in personam or sequester their property. Failing such service or sequestration, upon motion of defendants, the action will be dismissed.

4. Plaintiffs' "Motion for Stay Pending Possible Appeal" is denied in view of the terms of paragraph 2 of this order.

/s/ STEEL, *J.*

THE OPINION OF THE DISTRICT COURT

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GEORGE P. BAKER, et al.,
Plaintiffs,

v.

FIDEL GOTZ, et al.,
Defendants.

Civil Action No. 4072

William E. Taylor, Jr., Esquire, Wilmington, Delaware, and Edwin P. Rome, Morris L. Weisberg, Special Counsel for Trustees of the Property of Penn Central Transportation Company, Philadelphia, Pennsylvania and Robert W. Blanchette, Philadelphia, Pennsylvania, Counsel for Trustees of the Property of Penn Central Transportation Company, for plaintiffs.

Arthur G. Connolly, Esquire and Arthur G. Connolly, Jr., Esquire, Wilmington, Delaware, and Saul L. Sherman, Esquire and William B. Graves, Esquire, New York, New York, of counsel, for defendants.

R. Franklin Balotti, Esquire, Wilmington, Delaware, for Textron Incorporated and Textron Atlantic Incorporated, petitioners.

OPINION

Wilmington, Delaware
Steel, J.:

Three defendants, non-residents of Delaware, whose property purports to have been sequestered under FRCP 4(e)* in an action praying, *inter alia,* for a money judgment against them, have moved upon the basis of affidavits to vacate the sequestration and/or dismiss for lack of jurisdiction. FRCP 4(e) incorporates by reference 10 Del. C. § 366** and its implementing Court of Chancery Rule 4(db).*

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* FRCP 4(e):

". . . Whenever a statute or rule of court of the state in which the district court is held provides . . . (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."

** 10 Del. C. § 366:

"(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a non-resident of the State of Delaware, the Court may make an order directing such non-resident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such non-resident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for three consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. . . ."

* Court of Chancery Rule 4(db):

"(1) No order shall be entered under 10 Del. C. § 366 unless it appears in the complaint that the defendant or any one or more of the defendants is a non-resident of the State of Delaware and the application therefor is accompanied by the affidavit of a plaintiff or other credible person stating:

(a) As to each non-resident defendant whose appearance is sought to be compelled, his last known address or a

The return of the sequestrator discloses that he purported to sequester the following property:

Property of Inter-Marketing Corp.

30,000 SSI Computer Corp. common stock purchase warrants.

$1,000,000 principal amount 7% subordinated note, SSI Computer Corp. (now ITEL Computer Leasing Corporation).

50 shares common stock.*

Property of Minolta

25,360,500 (Swiss francs) principal amount 8% notes of Textron Atlantic, Inc.

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statement that such address is unknown and cannot with due diligence be ascertained.

(b) The following information as to the property of each such defendant sought to be seized:

(1) A reasonable description thereof.

(2) The estimated amount and value thereof.

(3) The nature of the defendant's title or interest therein; and if such title or interest be equitable in nature, the name of the holder of the legal title.

(4) The source of affiant's information as to any of the items as to which the affidavit is made on information and belief.

(5) The reason for the omission of any of the required statements.

* * *

(4) Within twenty days after seizure, unless otherwise specially ordered, the sequestrator shall make his return to the court, therein setting out all proceedings hereunder to the date of said return, including the date and hour of service and seizure pursuant to subdivision (3) hereof.

(5) The court may in its discretion and subject to statutory requirements dispense with or modify compliance with the requirements of any part of this rule in any cause upon application to it stating the reasons therefor."

* The name of the company whose common stock was purportedly sequestered is not shown in the sequestrator's report but it is conceded to be stock of SSI Computer Corp.

Property of Vileda

$500,000 principal amount of SSI Computer Corp. debentures (now ITEL Computer Leasing Corporation).**

10,000 ITEL warrants.*

Plaintiffs are three individuals who were duly appointed trustees of the property of Penn Central Transportation Co., debtor in proceedings for reorganization of the railroad pursuant to § 77 of the Bankruptcy Act, by the Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania.

The eight defendants are either natural persons, "juridical persons", or corporations, all of whom are citizens of foreign states and reside in continental Europe. The complaint charges that seven of the defendants are completely controlled and dominated by the eighth defendant, Fidel Götz, that one or more of them entered into a conspiracy with Götz to convert and embezzle and did convert and embezzle $4,000,000 belonging to the Penn Central Transportation Company in order to benefit Fidel Götz and/or one or more of themselves in breach of their fiduciary obligations to Penn Central. The complaint prays that the defendants be required to account to plaintiffs in the amount

** The evidence supports the conclusion that these debentures had been sold by Vileda on December 22, 1970 by physical delivery and by payment, but on the date of the sequestration, March 19, 1971, registration in the name of the purchaser had not been effected by the transfer agent due to its request for additional signature guarantees. The buyer was in the course of supplying these when the sequestration took place.

* By order dated September 14, 1971, the sequestration as to these warrants was inadvertently vacated. In view of the disposition which is made of the present motion this inadvertency is immaterial.

of $4,000,000 with interest and accretions, that a judgment be entered against the defendants, jointly and severly, for punitive, exemplary, or vindictive damages, and for other relief. Jurisdiction is predicated upon 28 U. S. C. § 1332(a)(2) pertaining to aliens and diversity of citizenship. The complaint is unverified. No answer has been filed.

The sequestration of property in Delaware owned by a non-resident defendant for the purpose of compelling the appearance of such a defendant in an action for a money judgment is authorized by 10 Del. C. § 366. As a result of the decision in *Cantor v. Sachs,* 162 A. 73, 85-86 (Del. Ch. 1932), decided under the stautory forerunner of § 366, an implementing rule was promulgated by the Court of Chancery which in its present form is Rule 4(db). *Greene v. Johnston,* 99 A. 2d 627, 637 (Sup. Ct. Del. 1953). Compliance with the affidavit requirement of Rule 4(db) is a condition to the sequestration of property owned by a non-resident defendant. In purported compliance with the Rule, William E. Taylor, attorney of record for plaintiffs, filed an affidavit which in part stated:

> "2. Upon information and belief, the source of which is Edwin P. Rome, Esquire, Special Counsel for the Trustees of Penn Central Transportation Company, the property sought to be seized is the following property in which Fidel Götz or Volker Götz has a legal or equitable interest, or in which one or more of the other named defendants, which are all controlled by Fidel Götz, has or have a legal or equitable interest:
>
> (a) Notes in the amount of approximately $7,000,000 issued by Textron, Inc., which are

owned by, or in which the following have an interest: Inter-Marketing Corp. Anstalt, Götz Aktiengesellschaft of St. Gallen, or Inter-Industry Aktiengesellschaft of St. Gallen, or one of the other defendants;

(b) Common stock of California Financial Corp., 11 Tillman Place, San Francisco, California, of an approximate value of $250,000, in which one or more of the defendants have an interest;

(c) Debentures and/or common stock of Culligan, Inc., of a value of approximately $150,000, in which defendant Vileda Anstalt, or one or more of the other defendants, has an interest;

(d) Convertible subordinated notes of C. B. K. Agronomics, Inc., 1125 Grand Avenue, Kansas City, Missouri, in which one or more of the defendants has an interest;

(e) Subordinated 7 percent notes of ITEL Computer Corporation (formerly known as S. S. I. Computer, Inc.) of a face value of $2,000,000, in which Finanz Aktiengesellschaft, or Vileda Anstalt, or Inter-Marketing Corp. Anstalt, or one of the other defendants has an interest;

(f) Common or preferred stock of Oceanography, Inc., of an approximate value of $500,000, in which one or more of the defendants has an interest;

(g) Debts, obligations and property of, or held by, Bache & Co. Incorporated, in

which defendant Inter-Marketing Corp. Anstalt, or one or more of the other defendants has an interest;

(h) Debts, obligations and property of, or held by, Eastman Dillon, Union Securities & Co. Incorporated, in which defendant Finanz Aktiengesellschaft, or defendant Inter-Marketing Corp. Anstalt, or one or more of the other defendants has an interest;

(i) Debts, obligations and property of, or held by duPont, Glore Forgan, Incorporated (formerly William R. Staats & Co. Incorporated or Glore Forgan, Wm. R. Staats Inc.), in which one or more of the defendants has an interest;

(j) Debts, obligations and property of, or held by duPont Glore Forgan Municipals, Incorporated (formerly Francis I. duPont Municipals, Inc.), in which one or more of the defendants has an interest;

(k) Notes issued by Textron, Atlantic, Inc., a wholly-owned subsidiary of Textron, Inc., in which Inter-Marketing Corp. Anstalt, Götz Aktiengesellschaft of St. Gallen, Inter-Industry Aktiengesellschaft of St. Gallen, Minolta Anstalt, or one or more of the other defendants has an interest;

(l) Common stock of Summit Industries, Inc. held by one or more of the defendants;

(m) Common Stock of Summit Corporation, held by one or more of the defendants."

The affidavit continued by alleging the non-residency of the defendants, setting forth their last known addresses and then continued:

"5. The number of shares of stock, notes, debentures, debts, contract obligations and any other property of said defendants ('property'), insofar as known to your affiant, are set forth in paragraph 2.

6. Affiant is unable to state the value of any of the property owned by any of said defendants, except as set forth in paragraph 2, because that information is peculiarly within the knowledge of said defendants and the corporation whose shares, notes, debentures, debts and contract obligations are involved.

7. The title of the defendants to said property cannot specifically be determined to be legal or equitable with respect to the various items of property listed in paragraph 2 because all of said property in whatever manner said property is held is subject to the control and domination of Fidel Gotz and cannot be determined from time to time, except on information obtained from said defendants.

8. Affiant is unaware of and, therefore, unable to state that any person or persons or other legal entities have an equitable or legal interest in any of said property because such information is peculiarly within the knowledge of the defendant Fidel Götz or persons or corporations subject to his control and domination and not available to plaintiffs or affiant.

9. The statements made herein are made upon information and belief, based upon information

supplied to affiant by Edwin P. Rome, Esquire, affiant's associate counsel, based upon investigation by (a) Mr. Rome, (b) Robert W. Blanchette, Esquire, Counsel for the Trustees of Penn Central Transportation Company, and (c) other partners in the firm of Blank, Rome, Klaus & Comisky, Special Counsel for the Trustees of Penn Central Transportation Company, appointed as such counsel by orders of the Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania.

10. Affiant has stated all knowledge which he or Mr. Rome presently has from investigations relating to the facts required to be set forth pursuant to Chancery Court Rule 4(dd). Any failure to specifically set forth the facts required by this Rule has been occasioned by affiant's inability to secure any further information."

This affidavit fails to state that either Inter-Marketing, Minolta or Vileda owned any of the property which has been sequestered. In paragraph 8 Taylor states that he is unware of and unable to state whether any of the defendants have any interest in any of the property which is specified in paragraph 2. Presumably paragraph 8 relates to Taylor's lack of personal knowledge. Paragraph 2 is based upon information and belief, the source of which is Edwin P. Roma, Esquire, Special Counsel for the Trustees, and it is likewise deficient for it fails to state that either Inter-Marketing, Minolta or Vileda own any of the property which has been seized. It says only that one or more of the eight defendants have an interest in one or the other of the thirteen categories of property specified in paragraph 2. This is tantamount to saying that

Inter-Marketing, Minolta or Vileda *may* be the owner of some of the property (not specifically designated as theirs) listed in paragraph 2. If Taylor's affidavit is sufficient to support the present seizure, so also would be an affidavit stating that one or more of fifty defendants *might* own specified stock or bonds in one or more of one hundred companies. On the basis of such an affidavit the sequestrator would be required to perform the duties of a "fisherman", to use the *Cantor v. Sachs* expression, and thereby ascertain which if any of the defendants owned which if any of the property designated. In the *Cantor* case Chancellor Wolcott said:

> "It seems to me that complainants who seek to bring their adversaries into court by seizure of their property ought to be prepared to say with reasonable certainty what property they desire to have seized." *Cantor v. Sachs,* 162 A. 73, 85 (Del. Ch. 1932).

The purpose of Rule 4(db) is to thwart fishing expeditions. *Rebstock v. Lutz,* 158 A. 2d 487 (Sup. Ct. Del. 1960), *Lutz v. Boas,* 156 A. 2d 96 (Del. Ch. 1959). This object would be defeated if the Taylor affidavit were held to be sufficient to support the sequestration.

Plaintiffs argue that the Taylor affidavit states the reasons why plaintiffs have not specified "the property of each defendant sought to be seized" and that therefore 4(db)(1)(b)(5) has been satisfied.* This authorizes a statement in the affidavit of

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* Paragraph 10 of the Taylor affidavit asserts that the affidavit contains all of the facts which he or his associate, Mr. Rome, have been able to ascertain and that:

> "Any failure to specifically set forth the facts required by this rule has been occasioned by affiant's inability to secure any further information."

"(5) The reasons for the omission of any of the *required* statements". (Italics supplied).

The "required" statements are only those necessary under Rule 4(db)(1)(b)(1-4). These include, as to the property of each defendant sought to be seized, a reasonable description, the estimated amount and value, the nature of the defendant's title or interest, and the source of the affiant's information as to any of the items stated upon information and belief. These are the only statements which may be excused under Rule 4(db)(1)(b)(5). *Rebstock v. Lutz, supra,* at p. 490, *Lutz v. Boas, supra.*

If a sequestration order is to be granted upon the basis of an affidavit which fails to specify the property of each defendant sought to be seized it can be done, if at all, only by following the procedure stated in Rule 4(db)(5).* This states that:

> "The court may in its discretion and subject to statutory requirements dispense with or modify compliance with the requirements of any part of the rule in any cause upon application to it stating the reasons therefor."

This rule was intended to provide a method by which plaintiffs who are for some reason unable to meet the general requirements of Rule 4(db) can be relieved from doing so if judicial approval is obtained after an application therefor has been filed, subject to the exception that the statements necessary under 4(db)(1)(b)(1-4) can be met by an affidavit which satisfies 4(db)(1)(b)(5). The need for a plaintiff to specify the property of each defendant sought to be seized is so basic that if it is excusable at all it can only

* This is to be distinguished from 4(db)(1)(b)(5).

be by judicial action taken under 4(db)(5). Plaintiffs have never applied for or obtained such approval. The mere fact that the sequestration order was signed was not compliance with Rule 4(db)(5), the object of which was to require the attention of the Court to be specifically directed to an omission not curable under 4(db)(1)(b)(5) before a sequestration order was entered.

Plaintiffs argue that paragraph 2 of the Taylor affidavit is tantamount to an allegation that the defendant Fidel Götz is in fact the owner of some or all of the property specified in paragraph 2 of Taylor's affidavit. This contention rests on the premise that the affidavit alleges that each of the seven defendants other than Fidel Götz is but his alter ego, agent or instrumentality. The language of paragraph 2 will not support this interpretation. Furthermore, the sequestrator's return fails to show Fidel Götz to be the record holder of any of the property attempted to be sequestered and specific shares in which Fidel Götz may have had a beneficial interest were not sufficiently identified in the papers served upon Inter-Marketing, Minolta or Vileda. Under similar circumstances the court said in *Cannon v. Union Chemical & Materials Corp.*, 144 A. 2d 145 (Del. Ch. 1958) at pp. 146-147 that it had obtained no jurisdiction under the sequestration statute.

The motion to vacate the sequestration will be granted because of the insufficiency of the Taylor affidavit. The defendants have raised other substantial objections to the validity of the seizure but it is unnecessary to pass upon any of these.

The order to be entered will stay the effectiveness of the vacation of the sequestration for five days from the date of the order for the purpose of enabling plaintiffs in the interim to seek appellate review of the order,

and a stay in either this Court or the Court or the Court of Appeals. This provision in the order will make moot the pending motion of plaintiffs styled "Motion for Stay Pending Possible Appeal."

The defendants argue that since the sequestration must be vacated the action as to the defendants Inter-Marketing, Minolta and Vileda must be dismissed. The same argument is made with reference to the other defendants who have successfully moved to quash the sequestration of their property. See order of September 14, 1971. It would be premature to dismiss the action simply because no effective service has brought the defendants or their property before the Court. The plaintiffs will be given until February 15, 1972 within which to effectively serve the defendants in personam or to sequester their property. Failing such service or sequestration the action, upon motion of defendants, will be dismissed. See *Schwartz v. Miner,* 133 A. 2d 599 (Del. Ch. 1957).

Pending also is the related petition of Textron Atlantic, Inc. and Textron, Inc., non-defendants, seeking instructions as to whether or not notes which they have issued have been effectively sequestered by the order of March 19, 1971. The reasons given for vacating the order of sequestration support the conclusion that they have not been.

Wilmington, Delaware

December 20, 1971

FEDERAL RULE OF CIVIL PROCEDURE 4(e), 28 U. S. C. (1960, CUM. ANN. PKT. PT. 1974).

Rule 4. Process.

(e) Same: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

DELAWARE SEQUESTRATION STATUTE, 10 DEL. C. § 366 (1953, CUM. SUPP. 1970).

§ 366. Compelling appearance of non-resident defendant.

(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a non-resident of the State of Delaware, the Court may make an order directing such non-resident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such non-resident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for three consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of

sufficient security. [As amended 50 Del. Laws, Ch. 379, § 1, eff. July 1, 1955.]

(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchase in accordance with law.

DELAWARE CHANCERY RULE 4(db), 13 DEL. CODE (1970).

(db) Service by Publication and Seizure. (1) No order shall be entered under 10 Del. C. § 366 unless it appears in the complaint that the defendant or any one or more of the defendants is a non-resident of the State of Delaware and the application therefor is accompanied by the affidavit of a plaintiff or other credible person stating:

(a) As to each non-resident defendant whose appearance is sought to be compelled, his last known address or a statement that such address is unknown and cannot with due diligence be ascertained.

(b) The following information as to the property of each such defendant sought to be seized:

(1) A reasonable description thereof.

(2) The estimated amount and value thereof.

(3) The nature of the defendant's title or interest therein; and if such title or interest be equitable in nature, the name of the holder of the legal title.

(4) The source of affiant's information as to any of the items as to which the affidavit is made on information and belief.

(5) The reason for the omission of any of the required statements.

(2) Within three business days after the filing of such bond or bonds as may be required or within such other time as the court may fix, the Register shall, in

addition to making the required publication, send by registered or certified mail to each defendant whose appearance is sought to be compelled a certified copy of the order and a copy of the pleading asserting the claim.

(3) After the filing of such bond or bonds as may be required by the order, but not later than 10 days after the date of the order of seizure, the sequestrator shall serve a certified copy of the order upon the person, persons or corporation having possession or custody of the property or control of its transfer, and shall seize the property. The sequestrator shall seize property which is, or appears, not to be susceptible of physical seizure within the state by serving a direction in writing that the person, persons or corporation having possession or custody of the property or control of its transfer, shall:

(a) retain the property and recognize no transfer thereof until further notice from the sequestrator or order of the Court;

(b) forthwith make a notation upon any records pertaining to the property that such property is held pursuant to the order of the Court; and

(c) within ten days after the date of such service, deliver a certificate under oath to the sequestrator, specifying (i) such defendant's property, if any, of which it has possession, custody or control or control of its transfer; (ii) whether the title or interest of each such defendant is legal or beneficial; and (iii) if legal, the name and address of the holder of any equitable title or interest therein, if known, and, if beneficial, the name and address of the holder of the legal title thereto, if known.

(4) Within twenty days after seizure, unless otherwise specially ordered, the sequestration shall make his return to the court, therein setting out all proceedings hereunder to the date of said return, including the date and hour of service and seizure pursuant to subdivision (3) hereof.

(5) The court may in its discretion and subject to statutory requirements dispense with or modify compliance with the requirements of any part of this rule in any cause upon application to it stating the reasons therefor.

8 DEL. C. § 169.

§ 169. *Situs of ownership of stock.*

For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State.

5A DEL. C. § 8-317.

§ 8-317. *Effect on attachment and sequestration laws; attachment or levy upon security.*

(1) Nothing contained in this title shall repeal, amend or in any way effect the provisions of sections 169 and 324, title 8, or sections 365 and 366, and chapter 35, title 10, and to the extent that any provision of this title is inconsistent with such sections, sections 169 and 324, title 8, and 365 and 366 and chapter 35, title 10, shall be controlling.

(2) A creditor whose debtor is the owner of a security shall be entitled to such aid from courts of appropriate jurisdiction, by injunction or otherwise, in reaching such security or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. 55 Del. Laws, Ch. 349, eff. July 1, 1967.

Delaware Study Comment.

Section 8-317(1) corresponds substantially with § 13 of the STA, except that the STA permitted levy or attachment without actual seizure if transfer by the holder was enjoined. Section 8-317(1), as recommended by the UCC draftsmen, would not permit a levy under any circumstances without physical seizure of the security. Section 13 of the STA was not enacted by Delaware.

The language set forth above in the Delaware draftsmen's revision of § 8-317(1) is similar to the language contained in 8 Del. C. § 202 on "Effect on

attachment and sequestration laws" except that references to 8 Del. C. § 169 (the situs provisions of the Delaware Corporation Law) and 10 Del. Chap. 35 (the statutory authorization for attachment) have been inserted to assure that the existing law would not be changed by enactment of the Code.

Section 8-317(2) is identical to § 14 of the STA which was enacted as 8 Del. C. § 193.

SECTION 8-317 OF THE UNIFORM COMMERCIAL CODE RECOMMENDED BY THE DRAFTSMEN THEREOF.

§ 8-317. *Attachment or Levy Upon Security.*

(1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source.

(2) A creditor whose debtor is the owner of a security shall be entitled to such aid from courts of appropriate jurisdiction, by injunction or otherwise, in reaching such security or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

UNIFORM CODE COMMENT.

Prior Uniform Statutory Provision: Sections 13, 14, Uniform Stock Transfer Act.

Changes: Rephrased for clarity.

Purposes of Changes:

1. In dealing with investment securities the instrument itself is the vital thing and therefore a valid levy cannot be made unless all possibility of the security finding its way into a transferee's hands has been removed. This can be accomplished only when the security has been reduced to possession by a public officer or by the issuer. A holder who has been enjoined can still transfer the security in contempt of court. See Overlock v. Jerome Portland Copper Min-

ing Co., 29 Ariz. 560, 243 P. 400 (1926). Therefore, although injunctive relief is provided in subsection (2) so that creditors may use this method to gain control of the security, the security itself must be reached to constitute a proper levy. The method used in Hodes v. Hodes, 176 Or. 102, 155 P. 2d 564 (1945), where the Oregon court enjoined the transfer of a security in a safe deposit box in the state of Washington, directing a copy of the writ to be served upon the issuer, although not operative as an effective levy, is a method of reaching the security approved by the section.

2. An attachment filed at the issuer's office against the shares represented by the security on the books is ineffective unless the security itself has been surrendered to the issuer. The case law holdings that priority in time of transfer or attachment governed the validity of the levy are rejected under this Article as under the Stock Transfer Act. See for example, National Bank of Pacific v. Western Pac. R. Co., 157 Cal. 573, 108 P. 676, 27 L. R. A., N. S., 987, 21 Ann. Cas. 1391 (1910).

3. This section deals with the problems of attaching or levying creditors and prevents such persons from securing rights paramount to those of purchasers who have actual possession of the security. It does not apply in cases where a governmental agency, for reasons of public safety or the like, seeks to confiscate securities. See, for example, the situation in Silesian American Corp. v. Clark, 332 U. S. 469, 68 S. Ct. 179, 92 L. Ed. 81 (1947), upon which this section has no bearing.

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT (SECTION 1) TO THE CONSTITUTION OF THE UNITED STATES.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STAFF REPORT OF THE COMMITTEE ON BANKING AND CURRENCY.

[COMMITTEE PRINT]

THE PENN CENTRAL FAILURE AND THE ROLE OF FINANCIAL INSTITUTIONS

PART IV

PENN CENTRAL LOSES FOUR MILLION DOLLARS: A STORY OF INTERNATIONAL INTRIGUE

STAFF REPORT OF THE COMMITTEE ON BANKING AND CURRENCY

HOUSE OF REPRESENTATIVES

92d Congress, First Session

MARCH 11, 1971

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LETTER OF TRANSMITTAL

To the Members of the Committee on Banking and Currency:

Transmitted herewith for use of the Banking and Currency Committee and the Congress is Part IV of the staff report on *The Penn Central Failure and the Role of Financial Institutions.* The title of this part of the report, *Penn Central Loses Four Million Dollars: A Story of International Intrigue,* hints at the magnitude and nature of the bizarre events resulting in the misappropriation of corporate funds.

The history of Penn Central's ill-fated and illegal attempt to control the air carrier, Executive Jet Aviation, was detailed in Part II of the staff report. A reading of that document is sufficient to comprehend just how fast and loose the high level financial officers of Penn Central were playing with the assets of the nation's largest transportation corporation. The episode recounted in this part is further dramatic evidence, if it were needed, of the decay that had infected the Penn Central management. It is not surprising that the incompetence resulted in the collapse of the railroad on June 21, 1970.

While there is no evidence to indicate that any Penn Central officer personally profited from the improperly seized funds, it is evident that the misappropriation could not have taken place without the aid of David Bevan, former chief financial officer of the railroad. Why and how David Bevan proceeded to place Penn Central loan funds in a place where former European associates in the EJA venture could obtain access to the money, is a tale of financial chicanery rarely matched in the annals of the business world.

The following is the staff's summary of the contents of Part IV of the study:

> The Penn Central Transportation Company in 1969 lost $4 million of a $10 million loan, obtained from a consortium of German banks, to a Mr. Fidel Goetz, a German national operating his far-flung business ventures out of the tiny European state of Liechtenstein.
>
> The intriguing story of how this incredible event happened is detailed in this part of the staff's investigation of the financial collapse of the Penn Central Transportation Company. It illustrates, among other things, how tangled the personal, financial and corporate affairs of Penn Central and its management became, thus contributing ultimately to the collapse of the Penn Central.
>
> Fidel Goetz became involved with Eexcutive Jet Aviation's plans in 1967 and 1968 to develop a worldwide air transportation system. The involvement of Penn Central, and particularly David Bevan, its chief financial officer, in the EJA adventure, including its dream of worldwide operation, were outlined in detail in Part II of this report. Fidel Goetz was an important part of the scheme, having invested substantial amounts of money in a number of foreign airlines which EJA controlled or attempted to control.
>
> David Bevan, while publicly contending that neither he nor Penn Central played any major role in the EJA debacle, attempted to protect himself from embarrassing disclosures threatened by Goetz concerning Bevan's involvement with EJA by permitting Goetz to utilize the interest-earning power of $4 million of the $10 million European bank loan.

Extremely dissatisfied with the large sums of money he had lost in the EJA venture, Goetz devised a plan not only to earn the interest on the $4 million, but to gain possession of the entire $4 million to compensate himself for losses allegedly incurred in his EJA dealings. In devising this plan, Goetz used as participants Joseph and Francis Rosenbaum, two attorneys practicing in a partnership in Washington, D. C. The Rosenbaum firm had acted as Goetz's attorney in the United States for many years. In addition, Joseph Rosenbaum had dealt with similar financial arrangements concerning the financing of Penn Central railroad car repairs and had helped secure the $10 million German bank loan for Penn Central.

Francis Rosenbaum, during the period that this loan was being arranged, was desperately in need of Fidel Goetz's assistance to avoid conviction under Federal indictment for fraud in connection with a multi-million dollar U. S. Navy procurement contract. Goetz had also played a role in this procurement fraud, and Francis Rosenbaum believed Goetz was the only person who could, or would, help him avoid serving a long prison sentence.

Through an elaborately conceived plan, outlined in detail in this report, Francis Rosenbaum allowed himself to be falsely represented by Goetz as an "authorized attorney" of Penn Central, without having such authority. Francis Rosenbaum, under pressure from Goetz, filed legal papers making himself, along with his brother Joseph, the owners of a shell Liechtenstein corporation. Francis Rosenbaum and Fidel Goetz

using these fraudulent devices, caused the payment of over $4 million of Penn Central funds to be transferred to the control of Goetz in the space of two hours.

Joseph Rosenbaum facilitated the transfer of funds to this newly created Liechtenstein company through his close contacts with high level financial officers in the Penn Central and his role in securing the $10 million German bank loan for Penn Central.

Subsequent to the events described above, it was discovered that Joseph Rosenbaum not only was co-owner of the shell Liechtenstein corporation which was used to transfer the $4 million of Penn Central funds to Fidel Goetz, but it was also found that Joseph Rosenbaum was made sole owner of this same corporation after Francis Rosenbaum was given a 10 year prison sentence.

It is clear from this analysis that by permitting Penn Central to become so intimately involved in Executive Jet Aviation's illegal ventures, the disclosure of which would have proven extremely embarrassing to both Penn Central and himself, David Bevan placed himself in a position where men far more expert in the art of international financial manipulation were able to misappropriate $4 million of Penn Central funds. To describe David Bevan's actions as grossly negligent would be generous indeed.

I am this day transmitting a copy of this report to appropriate Federal and State law enforcement agencies requesting a complete investigation to determine whether there have been violations of any laws

or regulations for whose enforcement they are responsible.

The views and conclusions found in this staff report do not necessarily express the views of the Committee or any of its individual members.

/s/ WRIGHT PATMAN
Wright Patman, *Chairman.*

CONTENTS

	Page
Letter of transmittal	III
Introduction	1
Goetz's financial involvement with EJA	2
The Berliner bank loan	4
"Authorized attorney" of Penn Central	6
Discovery of missing funds	9
Closing comment	13

THE PENN CENTRAL FAILURE AND THE ROLE OF FINANCIAL INSTITUTIONS

PART IV

PENN CENTRAL LOSES FOUR MILLION DOLLARS: A STORY OF INTERNATIONAL INTRIGUE

INTRODUCTION

In Part II of the staff report on *The Penn Central Failure and the Role of Financial Institutions, Case Study of a Penn Central Subsidiary: Executive Jet Aviation,* the broad outline of a transaction resulting in the loss of over $4 million of Penn Central funds was described. At that time, many of the details surrounding this loss of funds were not known. Further investigation has uncovered some startling information involving many of the participants in the ill-fated Executive Jet Aviation (EJA) venture.

As detailed in Part II of the staff report, the Civil Aeronautics Board (CAB) found the Pennsylvania Railroad (subsequently renamed the Penn Central Transportation Company upon merger with the New York Central Railroad in February 1968) engaged in an illegal attempt to control an air carrier, i.e., Executive Jet Aviation, and was fined $65,000 by the CAB for 13 separate violations of the Federal Aviation Act. Included in the CAB order was the finding that the Pennsylvania Railroad (PRR) was intimately involved in an attempt by EJA to acquire a worldwide network of air carriers. One of the chief operatives in this foreign airline acquisition program was a Mr. Fidel Goetz, a German national conducting many of

his business operations in Liechtenstein, a tiny European state noted in financial circles for laws allowing businesses to operate in almost complete secrecy.

How Fidel Goetz managed to compound Penn Central's losses through its involvement in the EJA venture has all the elements of a film script of international financial intrigue. The story includes attempts to quiet certain parties with the use of corporate funds, attorneys falsely representing themselves as authorized to act on behalf of another party while under criminal indictment, transferring of funds to the bank account of a non-existent company, and other equally bizarre activities. The stakes for Penn Central were high, as the railroad had already invested over $20 million in EJA, as well as obtaining $18 million in bank loans to finance EJA activities when these loan funds were desperately needed by the railroad itself. Considering what was at stake, it is no small wonder that this game of international intrigue was played in earnest.

Goetz's Financial Involvement With EJA

Fidel Goetz had in 1967 and 1968 loaned money and contributed investment capital to EJA for a number of acquisitions of foreign airlines; they included Transavia, International Air Bahamas, Sudflug and Sudwestflug (later renamed German Air). Goetz was to be the owner of these airlines pending EJA's acquisition of the Johnson Flying Service supplemental airline certificate, which would have permitted EJA to acquire them outright. The CAB's refusal of EJA's request to acquire Johnson Flying Service short-circuited these plans.

The exact amount of money that Fidel Goetz invested in EJA related airlines is not entirely clear.

The CAB found that Fidel Goetz loaned $650,000 to EJA for which he received a note bearing warrants for 40,000 shares of EJA common stock, exercisable at $10 per share. In addition, Goetz invested various amounts of money in Sudflug as well as Sudwestflug, but the exact sum is not ascertainable. The vehicle through which Goetz made most of these investments was an entity called Finanz A.G., one of many of Goetz's companies involved in this episode. It is reasonable to assume that Goetz was in total control of all these companies.

A letter dated June 26, 1967, reproduced below, from Francis Rosenbaum, a Washington D. C. attorney who represented Goetz on these and other matters, to General Charles Hodge, Chairman of the Executive Committee of Glore Forgan, Wm. R. Staats Inc. (Glore Forgan), with a copy going to Bruce Sundlun, then EJA's general counsel, indicates that Finanz A.G. put up at least $200,000 in connection with the Sudflug acquisition.

JUNE 26, 1967.

Gen. CHARLES J. HODGE
Glore Forgan, Wm. R. Staats, Inc.
New York, N.Y.

DEAR GENERAL: I am attaching the statement I received from Finanz AG for interest on $200,000 at 8 percent for the period April 10 through June 16, 1967, in connection with the Sudflug matter. This amounts to $2,933.33. I would appreciate it if you would advise me how you wish to handle this, as well as the participation you feel Joe and I should take, which we will be glad to do.

I would like, if possible, to have your thoughts regarding the Bavarian Airline this week as I expect to be in Europe visiting with Mr. Gotz [sic] next week.

Sincerely yours,

FRANCIS ROSENBAUM

The reply letter, appearing below, from Charles Hodge's secretary to Colonel Joseph Rosenbaum, Francis' brother and partner in the law firm of Goodwin, Rosenbaum, Meacham & White, enclosed a check for the interest on the $200,000. What is curious about this is that the check is not made out to Finanz A.G. but rather to Agencia Industrial c. por A, another of Goetz's business entities, and that General Hodge paid the interest charges, implying the loan was in favor of General Hodge.

GLORE FORGAN, WM. R. STAATS, INC.,
New York, N.Y., July 18, 1967.

Col. JOSEPH H. ROSENBAUM,
Goodwin, Rosenbaum, Meacham & White
Washington, D.C.

DEAR COL. ROSENBAUM: As requested over the telephone this morning by your secretary, you will find a check drawn to the order of Agencia Industrial c. por A in the amount of $2,933.33 covering interest on $200,000 at 8 percent for the period April 10 through June 16, 1967, in connection with the Sudflug matter.

Kind regards.

Sincerely,

MARTHA FONNER,
Secretary to Charles J. Hodge,
Chairman, Executive Committee.

From these and other documents in the possession of the staff, it can be stated that Fidel Goetz, represented by Francis and Joseph Rosenbaum, invested in numerous supplemental air carriers as part of EJA's "worldwide operating rights program." These investments were undertaken with the advice and consent in each case of either Charles Hodge of Glore Forgan, David Bevan, chief financial officer of the PRR, or General O. F. Lassiter, President of EJA, but ratified at a later time by all three gentlemen.

The brothers Rosenbaum represented Fidel Goetz for the time period 1966 to 1969, when Goetz invested in these air carriers. In this same time span, the Rosenbaum law firm received $2.5 million from Vileda Anstalt, another of the seemingly endless Fidel Goetz entities, which figures most prominently in subsequent events. While there is no explanation given why this large amount of cash was sent by Goetz to the Rosenbaum law firm, it is fair to assume that this money was to be invested in EJA related companies since Goetz later claimed as much. These payments were merely described as "open security deposits to be repaid upon demand."

In January 1969, EJA withdrew their application from the CAB for the Johnson Flying Service certificate, thereby signaling the end of the "worldwide operating rights program" envisioned by EJA. By that time it was obvious to David Bevan, chief financial officer of Penn Central, and his assistant William Gerstnecker, that it was necessary to disassociate themselves from any of the former attempts to gain control of these foreign air carrier rights. Fidel Goetz was still the principal investor at that time of a number of these foreign air carriers which no longer fit into

the plans of EJA. All of them, including Transavia and International Air Bahamas, were eventually sold to other parties.

According to the account given by David Bevan to attorneys representing the Penn Central Trustees, in the summer of 1969 Fidel Goetz communicated his extreme discontentment with the eventual disposition of his air carrier interests, and told David Bevan that he would like to be recompensed for his losses. David Bevan was at this time negotiating with the CAB on the final wording of their cease and desist order involving Penn Central control over EJA, and was, of course, very sensitive to any implied suggestions that Fidel Goetz would make public any of the various transactions in which Bevan utilized Goetz as a financial associate of EJA. The manner in which these transactions were conducted in contravention of the Federal Aviation Act would have substantially damaged Penn Central's stance before the CAB.

As related to representatives for the Trustees, David Bevan met Volker Goetz, said to be Fidel Goetz's son, in August of 1969 in New York to discuss his father's losses in connection with the air carrier acquisition. At this meeting, David Bevan allegedly told Volker Goetz that he would make his father whole for his efforts on behalf of EJA. To put it bluntly, Bevan desired to silence Goetz while the EJA controversy was still before the CAB.

The Berliner Bank Loan

In the summer of 1960, Joseph Rosenbaum, along with William Strub of R. W. Pressprich Overseas, Ltd., were seeking to obtain a commitment from certain German banks to furnish loan funds to Penn Central

Transportation Company to finance the rehabilitation of used railroad equipment. This was not an unusual transaction for Joseph Rosenbaum, since he had put together a similar loan in May of 1969, receiving a fee from Penn Central for his services. In fact, the May 1969 loan agreement involved a conditional sales agreement with American Investors Company having the same address as the Rosenbaum law firm. Joseph Rosenbaum, acting as both principal and agent of American Investors Company, had been quite active in soliciting qualified investors in four previous conditional sales agreements for the rehabilitation of PRR railroad equipment. Joseph Rosenbaum told staff investigators previously that he, as well as Charles Hodge, beneficially owned some of this conditional sales paper.

In August of 1969, Joseph Rosenbaum and William Strub were successful in securing a 40 million Deutsche Mark (DM) loan (approximately $10 million) from a consortium of German banks headed by the Berliner Bank Aktiengesellschaft in favor of the American Contract Company (ACC), a 100 per cent owned subsidiary of Penn Central Transportation Company. The German banks were principally interested in lending money to the railroad itself and desired a promissory note to evidence the debt. However, a note of the railroad company would have required Interstate Commerce Commission (ICC) approval, while a note from American Contract Company would not. Therefore, the conditional sales agreement between ACC and the Transportation Company was assigned to the Berliner Bank and was guaranteed by the Transportation Company. The loan was to be repaid in 8 semi-annual installments (7 for DM2,500,000

and the last one for DM22,500,000) starting on March 15, 1970 and ending September 15, 1973 with interest at 8 per cent at an issue price of 98, thereby yielding to Penn Central DM39,200,000. In effect, American Contract Company was the entity borrowing the money from the German banks, but there is no question that it was the Transportation Company to which the German banks would look for satisfaction of the loan.

Through the brothers Rosenbaum, who were privy to information from both Penn Central and Fidel Goetz, an understanding was reached whereby Bevan agreed to place the $10 million in a Liechtenstein trust under Goetz's control, allowing investment of the money prior to withdrawing the funds when the railroad equipment was ready for rehabilitation. It is customary to invest loan funds for conditional sales agreements while the used equipment is being gathered together. It is not normal operating procedure, however, to put the money in a Liechtenstein trust. Bevan agreed to this arrangement in the hope that it would satisfy Goetz for the time being.

Pursuant to David Bevan's instructions, the American Contract Company entered into an agreement on September 12, 1969, the same date the other loan documents were signed, with First Financial Trust of Liechtenstein whereby the latter was to hold the DM40,000,000 in trust and to invest it for Penn Central's account. The letter giving these instructions to First Financial Trust is reproduced below. It is quite significant that the address on the letter is that of Fidel Goetz, necessitated by the fact that as of September 12, 1969, an entity having the name First Financial Trust did not exist, as will be more fully explained later.

AMERICAN CONTRACT CO.
Philadelphia, Pa., September 12, 1969.

FIRST FINANCIAL TRUST, REG.,
Comerzhaus,
Vaduz, Liechtenstein.

GENTLEMEN: We have directed the Berliner Bank, from whom we are borrowing DM40,000,000, to credit the proceeds of this loan to your account. By your signature below, you are evidencing your agreement that such funds are to be held in trust and invested and reinvested for our account, to the extent not advanced to us for the rehabilitation of equipment to be leased to Penn Central Transportation Company or for the payment of principal or interest on the aforesaid loan.

It is understood between us that, while the responsibility for investment decision is yours, the investments are intended not merely to provide a return on the funds but also to protect us insofar as possible against the possibility of revaluation of the deutsche mark. We will, moreover, keep you fully informed in advance of the progress of our equipment rehabilitation program, so that you may plan your investment program accordingly.

For your services and expenses you are to receive 25% of the amount by which the income on the funds so invested exceeds the interest rate on the aforesaid loan, applicable to that portion of the funds.

Very truly yours,

EARL DERMOND,
President.

Agreed:

.....
FIRST FINANCIAL TRUST, REG.

In addition to the September 12 instructions given in the letter to First Financial Trust, American Contract Company sent two letters on September 12, 1969, to the Berliner Bank directing it to disperse the proceeds of the DM40,000,000 loan to two different places. One letter instructed the Berliner Bank to transfer the money directly to First Financial Trust of Liechtenstein, but obviously the Berliner Bank informed American Contract Company orally that they would not do this. The reason given by the attorneys for the Berliner Bank is that they did not normally transfer loan funds to anyone but a bank with which the borrower had an account. A second letter was then writen directing the Berliner Bank to transfer the money to the Allgemeine Bank Gesellschaft A. G. of Frankfurt, Germany, which was both a correspondent bank of the Berliner Bank and Chemical Bank of New York. In this way, the funds could be remitted to an account of the borrower in the Allgemeine Bank, since Penn Central already had an existing account there.

Then a phone call was made from the Penn Central offices to the Chemical Bank of New York requesting them to transfer the funds from their correspondent Allegemeine Bank in Frankfurt to the First Financial Trust of Liechtenstein. The officer of Chemical Bank insisted that this request be put in writing and that the funds be deposited in Chemical's correspondent bank in Liechtenstein. This Chemical bank officer told staff investigators that before he would transfer the funds he required written confirmation, because Penn Central's request was an unusual one, and that he was familiar with the reputation of Liechtenstein business entities.

All of the above transactions took place within a few days, and on September 18, 1969, the Penn Central

Treasurer sent a letter, reproduced below, requesting the transfer of funds, with a copy going to Joseph Rosenbaum.

PENN CENTRAL TRANSPORTATION CO.,
Philadelphia, Pa., September 18, 1969.

MR. PETER K. SCHUMANN,
Corporate Finance Division, Chemical Bank,
New York, N. Y.

DEAR MR. SCHUMANN: This will confirm our telephone conversation in which we have instructed you to transfer from the Chemical Bank's account with Allgemeine Bankgeselleschaft, Frankfurt, DM39,200,000 to the Bank in Lichtenstein, Vaduz, Lichtenstein, for account of the First Financial Trust, Reg., Comerzhaus, Vadux, Lichtenstein, today.

These funds are deposited with the First Financial Trust Company for account of Penn Central Company. Will you please furnish us with the appropriate credit advices.

Sincerely yours,

J. N. SHAFFER, *Treasurer.*

"AUTHORIZED ATTORNEY" OF PENN CENTRAL

Meanwhile, back in Liechtenstein, Fidel Goetz was feverishly preparing a welcoming party for Penn Central's DM40,000,000. Fidel Goetz, pursuant to his understanding with David Bevan that the proceeds from this German bank loan were to be put into one of his Liechtenstein entities pending the draw down for the equipment rehabilitation, decided to convert a dormant

corporation into an entity that would be capable of receiving these funds.

Since Francis Rosenbaum, as well as his brother Joseph, play such an important role in this whole matter, it is necessary to describe their relationship with Fidel Goetz. The Rosenbaum brothers had been attorneys for Fidel Goetz since approximately 1961. Francis Rosenbaum was also a director of Chromcraft Corporation and Alsco, Inc., the former being merged into the latter in May of 1966. These companies were thes prime contractor for the Navy Department for millions of dollars of rocket launchers. Dummy companies were set up in the United States as subcontractors which were supplied fraudulent invoices from dummy European firms. The Navy Department was thereby charged for materials that were never ordered or shipped. By paying off the phony European bills, Francis Rosenbaum was able to siphon off funds to secret Swiss bank accounts. Some of these funds were funnelled through Finanz A. G., a Goetz entity, and Goetz would take a percentage of these funds and remit separate funds back into the United States. (See hearings on *Foreign Bank Secrecy and Bank Records*, before the Committee on Banking and Currency, House of Representatives, 91st Congress, 1st Session, on H. R. 15073.) According to a civil suit filed in the U. S. District Court, Eastern District of Missouri, relating to this case, John Seabrook, a director of Penn Central, was alleged to have been in charge of investing the funds Finanz A. G. sent back to the United States cleansed of their association with the rocket launcher procurement fraud.

In the summer of 1968 the Justice Department secured indictments against Mr. Francis Rosenbaum and a number of other people involved in the Chrom-

craft case. As the case developed, Francis Rosenbaum believed his only possible chance of avoiding conviction would be to show that the funds that came back into this country from Finanz A. G. were in fact Mr. Goetz's own funds and not those derived from the fraudulent procurement contract with the United States government. In order to obtain evidence on this point, Francis Rosebaum, in early September of 1969, traveled to Liechtenstein at least twice to try to obtain from Fidel Goetz an affidavit attesting to this fact. For Fidel Goetz, the timing of these visits could not have been better, since it allowed him to learn of the details of the Berliner Bank loan and permit him to prepare all the necessary papers.

Upon his arrival in Liechtenstein on his second trip, Francis Rosenbaum was taken by Goetz to the law offices of Dr. Peter Marxer, a very influential man in Liechtenstein affairs. Dr. Marxer and his partner, Adulf Goop, often acted as agents for people doing business in Liechtenstein. Fidel Goetz introduced Francis Rosenbaum as an "authorized attorney" of Penn Central and asked that Francis Rosenbaum sign all the papers, already prepared under Goetz's direction, designating Francis Rosenbaum as the owner of First Financial Trust of Liechtenstein, a corporation born on September 15, 1969. This was three days after Penn Central ordered the funds transferred from Frankfurt to First Financial Trust of Liechtenstein. Dr. Marxer, who was not present at this meeting, and Mr. Goop were appointed as sole agents for Francis Rosenbaum and Joseph Rosenbaum, who were listed as co-principals with full rights of disposition over funds in First Financial Trust of Liechtenstein.

Goetz also had Francis Rosenbaum, represented by Goetz as Penn Central's attorney, instruct Dr.

Marxer and Mr. Goop to pay over to Vileda Anstalt, a Goetz company, the sum of DM16,800,000 out of the monies soon to be coming from Penn Central. Vileda Anstalt was owed this money, said Goetz, because of his losses in the various EJA ventures. An accounting of these alleged losses was signed by Francis Rosenbaum, acting as owner of First Financial Trust, indicating to Marxer and Goop that it was a true accounting since Francis Rosenbaum was also advertised as Penn Central attorney. The accounting also contained an agreement stating that First Financial Trust would assume all obligations under these air carrier transactions. So not only would Goetz obtain the money he claimed was due to him, but he would also be relieved of any potential liability thereunder.

This entire series of transactions allowing Goetz to obtain complete control of over $4 million of Penn Central funds took no more than two hours to complete.

When the money was received by First Financial Trust of Liechtenstein in a bank account hurriedly opened in the Bank of Liechtenstein, the bank suggested by the Chemical Bank, the DM16,800,000 were immediately paid over to Vileda Anstalt, controlled by Goetz, pursuant to the instructions given Marxer and Goop b yFrancis Rosenbaum. Since the deutsche mark was revalued shortly after September 12, 1969, this represented a loss to Penn Central of well over $4,600,000.

Documents in the possession of the staff show that Goetz, through Vileda Anstalt, actually submitted an accounting to First Financial Trust showing $729,000 in additional losses resulting from his EJA ventures, and asked that an additional $729,000 be transferred to Vileda Anstalt. Payment was asked for prior to

December 31, 1969, but all evidence indicated this additional money was never forthcoming. It appears the only reason the additional $729,000 was not paid over to Vileda Anstalt was that it would not have left enough money remaining in the account for the $6 million to be paid over to Penn Central.

Francis Rosenbaum also authorized payment of $30,00 to a Swiss attorney, Gerald Henry, for his services in allegedly procuring the DM40,000,000 loan, although there is no documentary evidence showing that Henry had anything to do with securing this loan.

Even though Francis Rosenbaum cooperated completely with Goetz, Goetz subsequently refused to supply the affidavit desperately needed by Francis Rosenbaum in order to avoid conviction. With no alternative, Francis Rosenbaum pleaded guilty in October of 1969 to nine counts of the thirty count indictment and was sentenced to ten years in the Federal penitentiary.

David Bevan's Account of the Transaction

As stated previously, David Bevan was anxious to placate Fidel Goetz in view of the damaging story he could tell about Bevan's EJA ventures. Bevan, according to the lawyers for the Penn Central Trustees, contends that the money was placed in First Financial Trust as a "compensating balance" to Fidel Goetz, although the term "compensating balance" is generally used for the amount of money kept on deposit with the entity that lends the funds. It would have been more apt to describe funds left in the Berliner Bank prior to its draw down for equipment rehabilitation as a compensating balance, if that were the case. Since the agreement with First Financial

Trust of Liechtenstein only provided for a 25 per cent fee for accrued interest above 8 per cent per annum, the most Goetz figured to realize from interest earnings was $10,000 per month, assuming Goetz could invest the funds at a generous 20 per cent per annum. This hardly would have made Goetz "whole" if he claimed to have lost over $4 million in the EJA related ventures.

Six million dollars was paid out to Penn Central's account in the Chemical Bank of New York by First Financial Trust in October of 1969, to be utilized to rehabilitate certain railroad equipment and $6 million of conditional sales paper was received by the Berliner Bank as security. During the winter of 1969-70 lower level financial officers of Penn Central inquired of Bevan when the additional $4 million was to be drawn down. The answer was that the equipment was not quite ready and that they should wait a couple of weeks or so. These same financial officers have informed staff investigators that Bevan was asked about the $4 million at least four times and they were given the same answer—be patient. The clear implication is that Bevan intended to leave the money with Goetz as long as possible to more fully compensate Goetz for his efforts on Penn Central's behalf, and, of course, to keep him mute.

Discovery of Missing Funds

The first party to realize that the additional $4 million was never utilized under the conditional sales agreement was the Berliner Bank after the news of the bankruptcy of the Penn Central Transportation Company hit the newspapers in Europe. In attempt-

ing to ascertain what security the Berliner Bank had, along with the other banks in the syndicate for this loan, it was discovered that only $6 million of the conditional sales paper was being held as security for the loan. The Berliner Bank proceeded to contact the Penn Central Transportation Company which, according to the Berliner Bank, was ignorant of this fact, and this started an investigation which has been in progress since then.

After an examination of the records at Penn Central, the Trustees undertook to determine what exactly happened to the money. On July 21, 1970, the following cablegram was sent to First Financial Trust, the address still being that of Mr. Goetz.

FIRST FINANCIAL TRUST, Reg.,
Comerzhaus,
Vaduz, Liechtenstein.

Pursuant to our cable of September 10, 1969 and our subsequent correspondence, there was deposited with your bank by the Berliner Bank the sum of about DM40,000,000 of which about DM24,000,000 has been disbursed leaving a balance on deposit with you of about DM16,000,000 which was to be invested for our account.

Please confirm exact present amount of funds including income accrued to date.

J. E. DERMOND,
American Contract Co., Wilmington, Del.

Rather than responding directly, Dr. Marxer immediately contacted Joseph Rosenbaum to get his instructions on how to answer this cablegram. The

reason Joseph Rosenbaum was contacted at this time, rather than Francis, is obvious, since Francis Rosenbaum had already begun his prison sentence and all rights and duties in First Financial Trust had been transferred to Joseph Rosenbaum. This came about in March of 1970 when Dr. Marxer wrote to Joseph Rosenbaum telling him that he and Adulf Goop no longer could act as agents for Francis Rosenbaum, since they had learned of his problems with the Federal authorities in this country. Below is the letter of March 10, 1970 to this effect:

MARCH 10, 1970.

MR. JOSEPH H. ROSENBAUM,
Goodwin, Rosenbaum & Meacham,
Washington, D. C.

DEAR MR. ROSENBAUM: My partner, Mr. Adulf Peter Goop, and myself are members of the Board of First Financial Trust reg.

Under the Contract of Agency you and Mr. Francis N. Rosenbaum are entitled to give the instructions. These instructions may be given singly.

Out of several newspapers we have read the different articles concerning Mr. Francis N. Rosenbaum. Under these circumstances we would like to cancel our Contract of Agency with Mr. Francis N. Rosenbaum. In the future it is only possible for us to remain as members of the Board, if we receive full information who the beneficial owner of the Founder-Rights of First Finance Trust reg. is and for whom you are acting.

We are sure, you will understand our request. Looking forward to your earliest reply, we remain

Very sincerely,

DR. PETER MARXER.

Joseph Rosenbaum wrote to Dr. Marxer agreeing that the contract of agency with Francis Rosenbaum be cancelled. Additional papers were prepared making Joseph Rosenbaum the sole principal for First Financial Trust. His letter of March 20, 1970 to Dr. Marxer contains the following statement:

The beneficial owner of the founder rights of First Financial Trust, Reg. is myself, and any and all profits arising from this transaction will belong solely to me and to no one else. There are no third parties involved.

Joseph Rosenbaum was now in complete control of First Financial Trust, and accordingly sent the following letter giving instructions on how to respond to a now impatient American Contract Company:

JULY 22, 1970.

DR. PETER MARXER,
Vaduz,
Liechtenstein.

DEAR DR. MARXER: With reference to the cable to the client, First Financial Trust, I would recommend that it be answered as follows:

"We offset the $4,000,000.00 in Deutsche Marks against amounts owed by Penn Central. An accounting follows by letter."

As soon as possible I will get the necessary data from our clients and forward it to you so that First

Financial Trust can write a letter setting forth the information.

Very truly yours,

J. H. ROSENBAUM.

After receiving Dr. Marxer's July 30, 1970 reply per Joseph Rosenbaum's instructions, American Contract Company immediately sent another cable with the following wording:

Has a letter accounting for DM4,000,000 promised in your cablegram of July 30 been sent yet? If not, when can we expect it to be sent—urgent we receive prompt reply.

It was now Mr. Goop's turn to write to Joseph Rosenbaum asking for his instructions to the above cable. Joseph Rosenbaum then wrote to Adulf Goop telling him that he should reply by stating that an account is being prepared and that it should be mailed within the next two weeks.

Finally, on October 5, 1970, after a delay of about 5 weeks, American Contract Company received the following accounting from First Financial Trust:

FIRST FINANCIAL TRUST REG., VADUZ,
Vaduz, 5. Oktober 1970.

MR. J. E. DERMOND,
American Contract Co.,
Wilmington, Del.

DEAR MR. DERMOND: You have asked for an accounting of the DM39,200,000 transferred to us on September 19th, 1969.

As you know, the accounting is as follows: (italic supplied)

Date		Debit	Credit
Sept. 22, 1969			39,200,000.00
Do	To Vileda Anstalt	16,800,000.00	.....
October 21, 1969	To Chemical Bank, Main - Office New York i. favour of Penn - Central office (U. S.-dollar 6 Mio. to an exchange rate of 3,7290)	22,347,000.00	.....
October 27, 1969	Interest	.....	14 000 00
	..do	.....	2 722 20
	..do	.....	12 444 45
	..do	.....	2 800 00
	..do	.....	20 533 30
November 25, 1969	To Gerald Henry, 72, Blvd. Saint-Georges, 1205 Geneva	73,695.75	.....
December 15, 1969	Charges	4.30	.....
	..do	1.90	.....
March 21, 1970	Fee, Dr. Peter Marxer	4,774.10	.....
June 19, 1970	Charges	8.40	.....
	..do	1.50	.....
	Balance	14.00	.....
		39,252,499.95	39,252,499.95

Very sincerely,

FIRST FINANCIAL TRUST REG.

The lawyers for the Trustees of the Penn Central Transportation Company were astounded by this reply and immediately responded by contending that there had been a breach of contract and that the $4 million should be returned to Penn Central Company immediately.

The reply from First Financial Trust on October 19, 1970, was:

Our American lawyers confirm our view that there has been no breach of contract of 15 September 1969 between American Contract Company and First Financial Trust, Reg. All actions taken by us done on instructions page 2 of authorized attorney of Penn Central and known by Penn Central management. Happy to discuss situation with you in Vaduz but insist we under no duty to send money to you.

The lawyers for the Trustees responded to this October 19 cable with the following:

OCTOBER 20, 1970.

DR. PETER MARXER,
Domar,
Vaduz, Liechtenstein.

Your cable from Paris received Philadelphia 9:30 AM October 19. Doctor Muller your representative stated to us in Philadelphia that First Financial Trust held remaining proceeds of loan from Berliner Bank amounting to not less than sixteen million eight hundred thousand DM in trust for account of American Contract Company and trustees of Penn Central Transportation Company. Neither Doctor Muller nor you in our telephone conversation of October 15 claimed you were holding these funds for anyone else. At that time, Doctor Muller, David Bevan and Colonel Joseph Rosenbaum confirmed in my presence that no authorization existed permitting diversion of trust funds other than in accordance with original loan from Berliner Bank in favor of American Contract and Penn Central. Demand is made upon you for dis-

closure of person or entity for whom you hold funds contrary to our direction for immediate remittance. In particular, disclosure is demanded of you as trustee of circumstances attending deposit of founds with Vileda Anstalt and of any transactions or affiliations you have or have had with interests connected with Fidel Goetz. I am only attorney authorized to act for Penn Central in respect of this trust and there is no evidence to support your reference to page two of any instructions.

Your failure to honor demand for transmittal of funds constitutes breach of trust for which you will be held to strict account including notice to appropriate government authorities. We have made full disclosure of our demand and your breach to attorneys for Berliner Bank for their appropriate action as creditor against all involved parties. Demand for immediate remittance reiterated.

EDWIN P. ROME
Philadelphia, Pa.

While this international cable battle was going on, Joseph Rosenbaum wrote the following letter to Adulf Goop:

August 31, 1970

Dr. ADULF PETER GOOP,
FL 9490,
Vaduz, Liechtenstein.

DEAR DR. GOOP: In connection with the First Financial Trust matter, I would like to have your legal opinion on one phase of the transaction.

In the letter of September 12, 1969, between the American Contract Company and the First Financial Trust it provides that the funds are to be held in trust and invested and re-invested for the account of the American Contract Company. I have no doubt that the offset of the $4,000,000 accomplished between First Financial Trust and Vileda Anstalt legally complied with the terms of the above-mentioned letter.

Would you be kind enough to write me your legal opinion that under the laws of Liechtenstein the action taken by First Financial Trust in making this payment to Vileda was legal and proper in all respects and complied with the terms of the letter of September 12, 1969. Any legal authorities or citations you can furnish me to back up this opinion would be helpful.

Sincerely,

J. H. ROSENBAUM.

The last paragraph of this letter is very interesting, to say the least, in that Joseph Rosenbaum wanted assurances from Marxer and Goop that what they were instructed to do by himself and his brother Francis had been legal under Liechtenstein law. As far as can be determined, no reply was every sent.

It should also be pointed out that during the Penn Central Trustees' attempts to recover the $4 million, Joseph Rosenbaum played a dual role. In dealing with the Penn Central attorneys he and his attorneys made the appearance of cooperating completely in trying to obtain from Goetz a return of the money. But it is clearly seen from Rosenbaum's correspondence with Marxer and Goop that he was instructing them to justify to Penn Central the transactions by which Goetz

obtained the funds through the Rosenbaum's own shell corporation.

After all the information was gathered, the lawyers for the Trustees discussed the situation with the lawyers for the Berliner Bank and decided to conditionally affirm the full $10 million conditional sales agreement with the Berliner Bank, but with the proviso that it would be subject to change if the money was not recovered. This allowed remittance to the September 15, 1970, payment to the Berliner Bank under the loan agreement. The Trustees correctly reasoned that since the first payments were small, no great liability was being borne by the Trustees in conditionally affirming the full $10 million.

The lawyers for the Trustees and Berliner Bank met and agreed to investigate the entire situation. This included trips to Liechtenstein and visits to the principal parties involved in the transaction. An interview was even had with Francis Rosenbaum, now in the custody of the Federal authorities. Every attempt was made to have the money returned without the institution of suit. Pursuant to that end discussions were held with David Bevan, Joseph Rosenbaum, Fidel Goetz and his representatives in Liechtenstein, Dr. Marxer and Adulf Goop. At one time, it appeared that there was an agreement to return the money to Penn Central without the necessity of instituting legal action. This turned out not to be the case and the final settlement offered by Fidel Goetz was a tiny fraction of the entire sum misappropriated.

Closing Comment

David Bevan obviously believed he had the ability to succeed in establishing control for the PRR of a

major international air carrier without going through all the cumbersome steps required by law. Not only did he not achieve his objective, but he also found out that there were people more adept at playing this game than he was.

Fidel Goetz was quite willing to assist David Bevan when there were the prospects of great profit arising out of the EJA venture, but when it all turned sour Goetz was not willing to bear the loss. This can partially be explained by the fact that it was Goetz's own money he was investing, while for David Bevan it was the assets of a large corporation and the credit acquiring power of that corporation that were being drained.

Assuming that David Bevan never believed Fidel Goetz could permanently appropriate the 4 million plus dollars, his decision to divert corporate funds from normal banking channels to attempt to compensate Mr. Goetz for keeping quiet about his financial efforts with an illegal venture was grossly negligent. Any interest these funds earned should have inured to the account of Penn Central and none other. That he stalled the withdrawal of these funds in order to provide Goetz a greater return from Penn Central's investment is ample evidence of his intent.

The staff attempted to contact David Bevan through his attorney Mr. Edward German, but learned that he was not available during the period of investigation for interview. His attorney did confirm that David Bevan's account of his role in this whole matter was given to the attorneys for the Trustees of Penn Central, from whom the staff received information.

As for the brothers Rosenbaum, a visit was made to the Rosenbaum law firm to hear Joseph Rosenbaum's

account of the matter. Mr. Rosenbaum refused to answer any questions, contending that he acted as Fidel Goetz's attorney throughout, and any information he had was protected by the attorney-client privilege. But the question must be asked, was Joseph Rosenbaum also acting as Fidel Goetz's attorney in arranging for the $10 million loan for Penn Central from which Goetz seized $4 million? And was Joseph Rosenbaum Fidel Goetz's attorney when acting as co-principal for First Financial Trust?

FILED
MAY 20 1974
MICHAEL RODAK, JR., CLERK

No. 73-1600

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLARD WIRTZ, Trustees of the Property of the PENN CENTRAL TRANSPORTATION COMPANY,

Petitioners,

v.

FIDEL GÖTZ, VOLKER GÖTZ, FINANZ AKTIENGESELLSCHAFT, VILEDA ANSTALT, GÖTZ AKTIENGESELLSCHAFT OF ST. GALLEN (Also Known as GÖTZ AG OF ST. GALLEN, or GÖTZ ANSTALT OF ST. GALLEN, or GÖTZ ESTABLISHMENT OF ST. GALLEN, or GÖTZ ESTABLISHMENT OF ST. GALLEN), INTER-INDUSTRY AKTIENGESELLSCHAFT OF ST. GALLEN (Also Known as INTER-INDUSTRY AG OF ST. GALLEN, or INTER-INDUSTRY ANSTALT OF ST. GALLEN, or INTER-INDUSTRY ESTABLISHMENT OF ST. GALLEN, or INTER-INDUSTRY ESTABLISHMENT OF ST. GALLEN), INTER-MARKETING CORP. ANSTALT (Also Known as INTER-MARKETING CORP. ESTABLISHMENT, or INTER-MARKETING CORP. ESTABLISHMENT), MINOLTA ANSTALT, and FINANZ AG ST. GALLEN,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

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May 20, 1974.

TABLE OF CONTENTS

	Page
Introductory	1
Questions Presented	2
Statement of the Case	3
Decisions Below	4
Summary of Argument	5
I. There are numerous state law issues which would be dispositive here, as they were below	6
A. The case was properly decided below on the insufficiency of the affidavit in support of sequestration	6
B. There were numerous other substantial state law grounds of decision which the courts below did not reach	8
1. Negotiability	8
2. Prior sale; adequacy of the complaint	9
3. Law vs. equity	10
II. There would be neither need nor occasion to pass upon the constitutional questions; nor can it be assumed that the Circuit Court reached the constitutional questions	11
Conclusion	13

CITATIONS

Cases: Page

Buechner v. *Farbenfabriken Bayer A.G.*, 151 A.2d 125 (Del. Sup. Ct. 1959) 10

Cantor v. *Sachs*, 162 A. 73 (Del. Ch. 1932) 4, 5, 7-8

Cochran v. *F. H. Smith Co.*, 174 A.119 (Del. Ch. 1943) 10

Crowell v. *Benson*, 285 U.S. 22 (1932) 11

Dairy Queen, Inc. v. *Wood*, 369 U.S. 469 (1962) 10

Gaskewicz v. *Spear*, 125 A.2d 269 (Del. Ch. 1956) 10

Hughes v. *T.W.A.*, 185 A.2d 886 (Del. Sup. Ct. 1962) 10

Landau v. *Best*, 187 A.2d 75 (Del. Sup. Ct. 1962) 9

Lynch v. *Overholser*, 369 U.S. 705 (1962) 11-12

Mitchell v. *W.T. Grant Co.*, ___ U.S. ___ (May 13, 1974) 8

Neil v. *Biggers*, 409 U. S. 188 (1972) 13

Sears, Roebuck & Co. v. *Jardel*, 421 F.2d 1048 (3rd Cir. 1970) 10

Schneider v. *Smith*, 390 U.S. 17 (1968) 12

Tharp v. *St. George's Trust Co.*, 34 A.2d 253 (Del. Ch. 1943) 10

United States v. *Pink*, 315 U.S. 203 (1942) 13

United States v. *Rumely*, 345 U.S. 41 (1953) 11

Washington Ethical Society v. *District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957) 12

Zubik v. *Zubik*, 384 F.2d 267 (3rd Cir. 1967) 10

Statutes:

5A Delaware Code § 1-105 9
§ 8-106 9
§ 8-317 8

8 Delaware Code § 169 8

UCC (New York and California) § 8-317(1), 54a 9

Miscellaneous:

United States Constitution
Fourth Amendment 3
Fifth Amendment 3
Fourteenth Amendment 3

Federal Rules of Civil Procedure, Rule 4(e) 1

Delaware Court of Chancery, Rule 4 (db) (89a-91a) 5, 7

No. 73-1600

IN THE

Supreme Court of the United States

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLARD WIRTZ, Trustees of the Property of the PENN CENTRAL TRANSPORTATION COMPANY,

Petitioners,

v.

FIDEL GÖTZ, VOLKER GÖTZ, FINANZ AKTIENGESELLSCHAFT, VILEDA ANSTALT, GÖTZ AKTIENGESELLSCHAFT OF ST. GALLEN (Also Known as GÖTZ AG OF ST. GALLEN, or GÖTZ ANSTALT OF ST. GALLEN, or GÖTZ ETABLISSEMENT OF ST. GALLEN, or GÖTZ ESTABLISHMENT OF ST. GALLEN), INTER-INDUSTRY AKTIENGESELLSCHAFT OF ST. GALLEN (Also Known as INTER-INDUSTRY AG OF ST. GALLEN, or INTER-INDUSTRY ANSTALT OF ST. GALLEN, or INTER-INDUSTRY ETABLISSEMENT OF ST. GALLEN, or INTER-INDUSTRY ESTABLISHMENT OF ST. GALLEN), INTER-MARKETING CORP. ANSTALT (Also Known as INTER-MARKETING CORP. ETABLISSEMENT, or INTER-MARKETING CORP. ESTABLISHMENT), MINOLTA ANSTALT, and FINANZ AG ST. GALLEN,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

This case arises out of a civil action for a money judgment brought against nine non-resident defendants in the United States District Court for the District of Delaware. Alleging that the defendants could not be personally served in Delaware, plaintiffs invoked the Delaware sequestration statute (see F.R.C.P. Rule 4(e)) and obtained an ex parte order sequestering certain securities allegedly belonging to the defendants.

The District Court later granted defendants' motion to vacate the sequestration—on the ground that plaintiffs had

not satisfied the procedural requirements of Delaware law (73a *et seq.*). An evenly divided Court of Appeals for the Third Circuit affirmed (6a-9a).

QUESTIONS PRESENTED

Because the Petition ignores the state law issues presented, we offer our counterstatement of the issues:

1. Whether the District Court was correct in vacating the sequestration order because, as a matter of Delaware law, the plaintiffs had failed sufficiently to specify the property to be seized and the nature or even the existence of the defendants' interests therein.

2. If not, whether the sequestration order would have to be vacated on one or more of the following additional state law grounds not passed upon by the courts below:

   (a) the notes, debentures and warrants purportedly seized are negotiable and therefore have no situs in Delaware and cannot be seized in Delaware under applicable state law;

   (b) of the three defendants whose property was purportedly seized, one had effectively transferred its property to a third party prior to the sequestration, and the Delaware procedural requirements had not been met as to the other two defendants because no bona fide substantive claim is asserted against them in the complaint; and

   (c) the Delaware sequestration statute is inapplicable because there is an adequate remedy at law, and under Delaware law sequestration is only available in equity.

3. If all of the foregoing state grounds are decided adversely to the defendants, whether the application of the

Delaware sequestration statute in the circumstances of this case would violate the Due Process and Search and Seizure provisions of the Constitution.

STATEMENT OF THE CASE

Plaintiffs allege that some of the defendants improperly received a payment from a fund deposited by one of plaintiffs' subsidiaries in Europe. Although it is now admitted that "there are no minimum contacts between [Delaware] and either the subject matter or the defendants" (Petn., p. 3), plaintiffs nevertheless sought to establish jurisdiction in the Delaware District Court by sequestering securities held outside of Delaware by the defendants. It is undisputed that these securities had nothing to do with the claim asserted, and that they were physically located outside Delaware and have never been physically seized in this proceeding—but they had been issued by companies which happened to be incorporated in Delaware. Such was the Delaware nexus on which plaintiffs sought to predicate jurisdiction.

Defendants argued to the District Court all of the issues of state law set forth above, and the District Court decided the case on the threshold ground of the insufficiency of the motion papers. The defect in the moving affidavit, the District Court held, was no mere matter of form, but rather reflected an attempt to use the process of the court for an improper purpose which the applicable Delaware Chancery Court rule was designed to prevent (82a). In particular, the moving affidavit did not demonstrate that plaintiffs had sufficient knowledge as to what if any property of the defendants was subject to seizure in Delaware, and plaintiffs had instead improperly used the court to locate property for them to seize (82a).

Neither party has put in a word of proper evidence as to the merits. The amended complaint is unverified, and such affidavits as plaintiffs have filed are admittedly double hearsay at best.* Defendants have necessarily remained silent as to the merits, for to do otherwise would have been to appear generally and submit to in personam jurisdiction in a totally inappropriate forum having no meaningful contact with the case.

DECISIONS BELOW

The District Court concluded that the sequestration should be vacated on purely state law grounds, saying:

> "The motion to vacate the sequestration will be granted because of the insufficiency of the Taylor affidavit. The defendants have raised other substantial objections to the validity of the seizure but it is unnecessary to pass upon any of these." (84a)

The District Court expressed as follows its reasons for finding the Taylor affidavit insufficient to meet the local requirements of Delaware law:

> "If Taylor's affidavit is sufficient to support the present seizure, so also would be an affidavit stating that one or more of fifty defendants *might* own specified stock or bonds in one or more of one hundred companies. On the basis of such an affidavit the sequestrator would be required to perform the duties of a 'fisherman', to use the *Cantor* v. *Sachs* expression, and thereby ascertain which if any of the defendants owned

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* As below, plaintiffs have tried to sway the Court by submitting a Congressional Committee Staff Report which has not been offered in evidence and is the rankest hearsay.

which if any of the property designated. In the *Cantor* case Chancellor Wolcott said:

> 'It seems to me that complainants who seek to bring their adversaries into court by seizure of their property ought to be prepared to say with reasonable certainty what property they desire to have seized.' *Cantor* v. *Sachs,* 162 A. 73, 85 (Del. Ch. 1932).
>
> "The purpose of Rule 4(db) is to thwart fishing expeditions. *Rebstock* v. *Lutz,* 158 A.2d 487 (Sup. Ct. Del. 1960), *Lutz* v. *Boas,* 156 A.2d 96 (Del. Ch. 1959). This object would be defeated if the Taylor affidavit were held to be sufficient to support the sequestration." (82a)

On appeal to the Third Circuit, a three-judge panel split 2-to-1, the majority voting to reverse and remand (11a). The full bench, however, granted defendants' petition for rehearing in banc. In doing so, the Court of Appeals in banc vacated the judgment of the three-judge panel (9a), thus expunging their opinions and depriving them of effect. After reargument before the full bench, the eight circuit judges sitting divided evenly, with the result that the District Court's decision was affirmed per curiam with no opinion expressed on any of the issues, state or federal (7a, 5a).

SUMMARY OF ARGUMENT

No constitutional questions were decided below, and this Court would have to decide numerous questions of state law (only one of them passed upon below) before any of the issues discussed in the Petition would be reached. These state law issues would be of little or no interest to this Court under the standards enunciated in Rule 19.

And yet the Court, under its deep-seated self-imposed doctrine of avoiding constitutional issues where possible, would be constrained to adopt any reasonable disposition of the state law issues which would make it unnecessary to confront the lurking constitutional questions. The state law grounds asserted are eminently reasonable, and there is not a word to the contrary in the Petition.

Denial of certiorari, on the other hand, would leave no lower court precedent on constitutional issues. No constitutional issues were decided below. Denial of certiorari would deprive no one of any claimed constitutional rights. It was defendants who claimed constitutional protections but our rights were vindicated on state law grounds, making recourse to the constitution unnecessary.

The repeated assertions in the Petition that the Court of Appeals divided evenly on the constitutional issues is utterly unfounded speculation, arrived at by the simple expedient of ignoring the state law issues. If anything, it would be more realistic to assume that the Circuit Court divided on the state law issue the District Court found controlling. All that can properly be said is that the Circuit Court decided nothing and affirmed of necessity.

I. THERE ARE NUMEROUS STATE LAW ISSUES WHICH WOULD BE DISPOSITIVE HERE, AS THEY WERE BELOW.

A. *THE CASE WAS PROPERLY DECIDED BELOW ON THE INSUFFICIENCY OF THE AFFIDAVIT IN SUPPORT OF SEQUESTRATION.*

As the District Court held, the sequestration order and the affidavit on which it was based were fatally defective because they did not specify the property to be seized,

as required by Delaware Court of Chancery Rule 4(db) and the Delaware cases. The affidavit merely indicated that one or more of the 9 defendants might have an interest in one or another of thirteen categories of property issued (or held) by one or more of 16 Delaware companies —a total of 144 inquiries, each as to many types of property. Many of the 16 Delaware companies were stock brokerage firms obviously holding securities for clients in hundreds of companies.

Of the 16 Delaware companies to whom the Notice of Sequestration was directed, two reported securities of one defendant each and one reported securities of two defendants. Thus, out of 144 inquiries, each pertaining to many varieties of obligations, only four—one in every 36—bore fruit.

Of nine defendants, property in the name of only three was found. Of sixteen companies notified, only three reported property in the name of any of the defendants.

Cantor v. *Sachs*, 162 A. 73 (Del. Ch. 1932), is one of a long line of Delaware cases holding that "scandalous abuses could be perpetrated" if a sequestration is so indefinite as to amount to a fishing expedition. As the Chancellor noted in *Cantor:*

> ". . . some safeguards should be provided against what for want of a better term I may call fishing expeditions. It seems to me that complainants who seek to bring their adversaries into Court by seizure of their property ought to be prepared to say with reasonable certainty what property they desire to have seized. It is hardly comportable with the dignity of the Court to appoint a judicial agent to go forth on a hunt in behalf of a

complainant and beat the bushes for him." At 85.

This Court has recently had occasion to emphasize the importance of having "facts . . . narrowly confined" under state law sequestration procedures. *Mitchell* v. *W. T. Grant Co.*, ____ U.S. ____ (May 13, 1974), slip opinion, p. 17.

It was precisely because the Taylor moving affidavit, and the sequestration order it gave rise to, were anything but "narrowly confined" that the District Court granted defendants' motion to vacate the sequestration.

This is the state law ground of decision by the District Court, which was affirmed by the evenly divided Court of Appeals, and which this Court would be asked to pass upon if it were to take the case.

B. *THERE WERE NUMEROUS OTHER SUBSTANTIAL STATE LAW GROUNDS OF DECISION WHICH THE COURTS BELOW DID NOT REACH.*

Having vacated the sequestration on the threshold ground of insufficiency of the moving papers, the District Court noted:

> "The defendants have raised other substantial objections to the validity of the seizure but it is unnecessary to pass upon any of these." (84a)

The grounds not passed upon below include the following:

(1) *Negotiability.* Delaware has a unique rule permitting seizure in Delaware of stock issued by Delaware corporations even if the stock certificates are not found in Delaware. 8 Del. C. § 169; cf. 5A Del. C. § 8-317. Defendants contended that this special Delaware rule applies only to stock, while plaintiffs contended that it applies to all securities of Delaware corporations, even if negotiable (Petn., pp. 23-24, par. 4). On our view, none of the securi-

ties purportedly sequestered in this case may be reached under the Delaware statutes (except for 50 shares of stock which there is no reason to believe meet the $10,000 jurisditional requirement).*

There is a related conflict of laws issue in the case as to whether Delaware law or New York and California law on negotiability and seizure apply. It is clear that the seizure was improper if Delaware looks to the law of the place of issue of the securities here in question, and Delaware does apply the law of other states in such situations. 5A Del. C. §§ 1-105, 8-106. Cf. *Landau* v. *Best,* 187 A.2d 75 (Del. Sup. Ct. 1962); UCC § 8-317, as enacted in New York and California (54a).

As Judge Gibbons put it in the panel:

> "Thus, under the *Landau* analysis none of the requested securities except the 50 shares of . . . stock . . . has a situs in Delaware, and none was subject to the quasi in rem jurisdiction of a Delaware court. As to all of these negotiable investment securities, the order quashing the sequestration should be affirmed." (54a)

(2) *Prior Sale; Adequacy of the Complaint.* Property of only three of the nine defendants was purportedly seized. As to one of the three, Vileda, the evidence showed it had sold its securities several months before the purported seizure (76a, fn.; the Itel warrants had likewise already been transferred by Vileda, Doc. 45, Par. 3). As to the other two defendants whose property was purportedly seized, there was no bona fide complaint against them, as is required under Delaware law before their property may be

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* In addition, there is no bona fide claim against the stockholder, defendant Inter-Marketing. See IB (2), *infra.*

seized. *Hughes* v. *TWA,* 185 A.2d 886, 889 (Del. Sup. Ct. 1962). The allegations of the amended complaint (par. 18(a)) merely included these two defendants in a group of five named companies, "one or more" of which was alleged to have been involved in the disputed transaction. Plaintiffs sought to repair this defect by asserting a further state law contention, arguing that the corporate veil could be pierced, so as to permit the property of each of these defendants to be treated as property of all, by virtue of common ownership and control. Delaware law is flatly to the contrary. *Buechner* v. *Farbenfabriken Bayer A.G.,* 151 A.2d 125 (Del. Sup. Ct. 1959); *Sears, Roebuck & Co.* v. *Jardel,* 421 F.2d 1048, 1053 (3rd Cir. 1970); *Zubik* v. *Zubik,* 384 F.2d 267, 270 (3rd Cir. 1967).

(3) *Law vs. Equity.* There was a further state law issue as to whether the Delaware sequestration statute was applicable at all, since defendants argued that the action was one at law, in which case attachment rather then sequestration would have been the proper device to invoke (with important differences as to the requisite showing plaintiffs would have had to make—see *Hughes* v. *TWA, supra,* at 889). The distinction between law and equity retains great vitality in Delaware, with its separate Court of Chancery. The transparent artifices by which these plaintiffs have sought to convert an ordinary claim for money into an equitable action have long since been rejected. *Cochran* v. *F. H. Smith Co.,* 174 A. 119, 121 (Del. Ct. 1943); *Gaskewicz* v. *Spear,* 125 A.2d 269, 270 (Del. Ct. 1956); see *Tharp* v. *St. George's Trust Co.,* 34 A. 2d 253, 255 (Del. Ct. 1943) (no special relationship of trust and confidence between the parties is even alleged in the present case); see also *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469, 477-78 (1962).

All of these state law questions would have to be decided here—and decided against respondents—before the constitutional questions we urged below, and which were not reached below, would be ripe for consideration here.

II. THERE WOULD BE NEITHER NEED NOR OCCASION TO PASS UPON THE CONSTITUTIONAL QUESTIONS; NOR CAN IT BE ASSUMED THAT THE CIRCUIT COURT REACHED THE CONSTITUTIONAL QUESTIONS.

Neither party before the Court claims that the decision below deprived it of any constitutional rights. Defendants invoked the Constitution as a last line of defense, but our position was sustained below on state law grounds. Petitioners claim no violation of any constitutional right of theirs. Thus to deny certiorari will not leave even a possibility of constitutional wrong as between these parties.

There having been no constitutional question decided below, there will be no lower court precedent which might result in a wrongful denial of constitutional rights in any future case.

It is surely not the practice of this Court to generate constitutional issues which need not be decided. Quite the contrary, the rule is well established that if a statute can be construed in such a way as to avoid raising a constitutional question, then that is how the statute should be construed. As phrased by Chief Justice Hughes:

> ". . . if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the qustion may be avoided." *Crowell* v. *Benson,* 285 U.S. 22, 62 (1932). See also: *United States* v. *Rumely,* 345 U.S. 41, 45-56 (1953); *Lynch* v.

Overholser, 369 U.S. 705, 711 (1962); *Schneider* v. *Smith,* 390 U.S. 17, 26 (1968); *Washington Ethical Society* v. *District of Columbia,* 249 F.2d 127 (D.C. Cir. 1957).

This Court would thus have every reason to seek a construction of the Delaware laws, or an application of them to the present facts, which would make it unnecessary to reach the constitutional issues discussed in the Petition.

Yet the decision below reached just such a result—it construed and applied the Delaware statutes, rules, and decisions in a fashion which vindicates the rights defendants asserted, and does so without recourse to the Constitution.

We point out in this connection that Judge Gibbons characterized the decision in question as an "interpretation by an experienced Delaware district court judge of a Delaware statute and rule, with both of which he is obviously far more familiar [than the three-judge Court of Appeals panel] . . ." (55a).

Since the application of Delaware law can be sustained, the constitutional questions need not and should not be dealt with.

As Judge Gibbons, who voted to affirm in the panel, said:

> "Since the district court's interpretation of the Delawar Sequestration Statute provides an adequate nonconstitutional basis for decision, I would affirm on that ground . . ." (43a).

The Petition repeatedly asserts without foundation that the Court of Appeals divided evenly on the constitutional grounds. There is no basis for that assumption. The disagreement may have been solely as to the state law grounds, so that the constitutional questions were not reached. The

simplest assumption is that there was a 4-to-4 deadlock as to the adequacy of plaintiffs' moving papers, so that none of the judges had occasion to consider any further issues. Indeed, since the Petition sets forth three distinct constitutional issues, it is likely that *at most* only one or two judges of the full bench reached any given constitutional issue.

Such speculation is fruitless, and it is entirely unwarranted in view of the wise and well settled rule that an affirmance by necessity decides nothing. *Neil* v. *Biggers* 409 U.S. 188, 191-92 (1972); *U.S.* v. *Pink*, 315 U.S. 203, 286 (1942).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied and the unlawful seizure of defendants' property should at last be ended.

Respectfully submitted,

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